123-297

123-297

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

No. 788. 468

JANE C. HITZ, APPELLANT,

vs.

WILLIAM P. JENKS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 5, 1885.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

No. 788.

JANE C. HITZ, APPELLANT,

vs.

WILLIAM P. JENKS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Petition of Benj. U. Keyser, receiver	1	1
Summons	5	3
Marshal's return	6	3
Answer of Jane C. Hitz	6	3
R. W. Tyler	15	6
Motion for order for account and distribution	19	8
Order for reference to auditor	20	9
Report of auditor	23	10
Schedule A—Account of rents collected and received by the complainant prior to the order of December 15, 1881	37	15
B—Account of rents collected by the complainant subsequent to the order of December 15, 1881	38	16
C—Account of taxes and assessments upon this property accruing prior to January, 1882, and those accruing during the years 1882 and 1883	39	17
D—Distribution of the fund in registry of the court deposited by complainant	40	18
Testimony of Benj. U. Keyser	41	19
John Sherman	57	26
John Hitz	66	30
Deed from John Hitz *et ux.* to Enoch Totten, trustee, March 1, 1881	70	31
Deed from R. W. Tyler, trustee, to Seth Caldwell, Jr., March 27, 1884	73	33
Assignment from John Hitz to Jane C. Hitz, Oct. 30, 1884	76	34

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Undertaking of receiver, March 4, 1879	78	35
Tax bills	79	35
Exceptions of Jane C. Hitz to report of auditor	87	39
Wm. P. Jenks " "	88	40
Order to pay auditor's fees	89	40
Exceptions of B. U. Keyser to report of auditor	90	41
Decree	91	41
Appeal of Jane C. Hitz	93	42
Bond	94	42
Certificate to record	95	43

1 *Petition of Benj. U. Keyser, Receiver. Filed Dec.* 14, 1883.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver of the German-American National Bank of Washington, Complainant, *vs.* JOHN HITZ *et al.*, Defendants.	Equity No. 6583.

To the honorable the judges of the supreme court of the District of Columbia, sitting in equity:

The petition of Benjamin U. Keyser, receiver as aforesaid, respectfully shows unto the court—

1st. That he is the duly appointed and qualified receiver of the German-American National Bank of Washington, appointed by the Comptroller of the Currency in pursuance of the laws of the United States.

2nd. That he is a creditor by two several judgments against the defendant, John Hitz, respectively rendered by this honorable court holding a circuit court, one in law case No. 21329, for $29,660.10, with interest and costs, as therein specified, and the other in
2 law case 22418, for $23,000, with interest and costs, as therein specified.

3rd. Petitioner is further informed, believes, and avers that the defendant, John Hitz, the judgment debtor aforesaid, is utterly insolvent, having no property, real or personal, subject to legal or equitable process for the satisfaction of said judgments, save and except the legal right for his life to the rents, issues, and profits of the real property of his wife, the defendant, Jane C. Hitz, to whom he was lawfully married on the 5th day of August, A. D. 1856, and that by reason of the death of her late father, the late Michael Shanks, which occurred May 20th, 1864, and the birth of several children of the defendants, John and Jane C. Hitz, two of said children being now living, and living issues having been born prior to the passage of the act of Congress commonly known as the "married woman's" act, the defendant, John Hitz, became and was and still is entitled to the rents, issues, and profits of the real property of his wife, the defendant, Jane C. Hitz, which vested in her as the sole heir-at-law of her late father, the said Michael Shanks, in the year A. D. 1864.

3 4th. That the real property which vested in Jane C. Hitz as aforesaid, and to which the defendant, John Hitz, is entitled as "tenant by courtesy," are the premises on the corner of 9th and G streets northwest, in the city of Washington, more particularly mentioned and described in the original bill and subsequent pleadings in this cause, and that petitioner, as receiver aforesaid, and under order of this honorable court, has collected the rents of said property to the amount of $4,000 and upwards, and deposited the same into the registry of the court to the credit of said cause; and inasmuch as he is advised that said rents are the property of the de-

fendant, John Hitz, and subject to the satisfaction of his debts according to their respective legal priorities, he prays—

First. That the defendants, John and Jane C. Hitz, and the defendants, Jenks and Tyler and Sarah L. Crane, be served with process in the usual form, commanding them to appear on a day certain and show cause, if any they may have, why the said
4 rents so deposited as aforesaid should not be paid to the petitioner on account of his said judgments against the defendant, John Hitz.

Second. That a decree may be passed directing the clerk of this court to pay to petitioner the amount so deposited as aforesaid on account of said judgments, and that the same be duly credited thereon according to priority; and

Third. For such other and further relief in the premises as the nature of the case may require, and as to the court may appear equitable and just.

BENJAMIN U. KEYSER.

I do solemnly swear that I have heard read the foregoing and annexed petition by me subscribed and know the contents thereof; that the facts therein stated on my personal knowledge are true, and that those stated on information and belief I believe to be true.

BENJAMIN U. KEYSER.

Subscribed and sworn to before me this 14th day of December, A. D. 1883.

JAMES H. GRIDLEY,
Notary Public.

ELLIOT & ROBINSON,
Sol'rs and of Counsel for Petitioner.

5 This copy by leave of court substituted for original, mislaid or lost.

Test: R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Ass't Cl'k.*

Endorsed.

Leave is hereby given this 2nd day of July, A. D. 1885, to file and substitute this copy in place of the original thereof, which has been lost or mislaid.

July 6, '85.

A. B. HAGNER.

Summons to Answer. Issued Dec'r 14, 1883.

In the Supreme Court of the District of Columbia, December 14th, 1883.

BENJAMIN U. KEYSER, Receiver [of the] German-American National Bank, Complainant,
vs.
JOHN HITZ *et al.*, Defendants.
} No. 6583. Equity Docket 19.

The President of the United States to John & Jane C. Hitz, W. P. Jenks, Richard W. Tyler, Sarah L. Crane, defendants:

You are hereby commanded to appear in this court, at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the petition of receiver under
6 pain of attachment and such other process of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk, &c.*,
By M. A. CLANCY, *Ass't Clerk.*

Marshal's Return.

Served John and Jane C. Hitz and Richard W. Tyler Dec. 15th, 1883; W. P. Jenks and Sarah L. Crane not to be found.

CLAYTON McMICHAEL,
U. S. Marshal.

Answer of Jane C. Hitz. Filed July 21, 1884.

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver of the German-American National Bank of Washington,
vs.
JOHN HITZ *et al.*
} Equity No. 6583.

Answer of Jane C. Hitz.

The separate answer of the defendant, Jane C. Hitz, one of the defendants in the bill of complaint above named, to the petition of B. U. Keyser, receiver, respectfully shows:

1. Answering the first paragraph of the petition, she says
7 that she is advised by counsel and believes, and thereupon avers, that the petitioner is not now and never was receiver of the said national bank, and that there never was such a corporation as the German-American National Bank of Washington.

2. Answering the second paragraph of the said petition, she says that she does not know whether any such judgments as are therein described appear of record, as alleged, against the said John Hitz, and she therefore calls for strict proof thereof. Further answering the averments in said paragraph, she says she is advised by counsel and believes, and thereupon avers, that if any such judg

ments do appear against the said John Hitz they are utterly null and void, because the said supreme court of the District of Columbia had no jurisdiction to entertain any such causes of action or to render any such judgments against the said John Hitz at the time or times when such actions were brought or such judgments were rendered.

She further says, on information and belief, that the parents
8 of the said John Hitz were citizens of the Republic of Switzerland, and that the said John Hitz was an alien and was born in the said Republic, in the year 1828, and that he was never naturalized and never declared his intention to become a citizen of the United States, and that on the 4th day of March, 1864, the high federal council of the Swiss Confederation issued its commission to John Hitz, her husband and one of the defendants in this cause, appointing him consul general of that Confederation "for the United States," and especially for the third district, "comprising the District of Columbia and the States of Virginia, Maryland, and Delaware, and that on the 23rd day of September, 1864, said John Hitz was duly recognized by the Executive Department of the United States as such consul general, and an *exequatur*, in due form, was executed and delivered to him by the United States, and that he was afterwards, and until about the 25th day of June, 1881, recognized as such "consul general" by the United States, and that he continued to perform all the duties appertaining to said pub-
9 lic office of said Confederation in the United States until the 25th day of June, 1881.

On or about the 28th day of February, 1868, the said federal council of the Swiss Confederation issued its credentials or letter of credence, by which it appointed the said John Hitz "political agent," or "*agent politique*," of the Swiss Confederation near the Government of the United States of America, and thereby conferred upon him the title and rank appertaining to that office; that on or about the 2d day of April, 1868, the said John Hitz was duly recognized as such political agent, or *agent politique*, by the Executive Department of the United States, and after that date was so recognized and continued to perform all the duties appertaining to that office in the United States until on or about the 25th day of June, 1881.

The duties appertaining to the said office consisted in the management of all the matters and affairs in the United States, national or diplomatic, commercial or otherwise, appertaining to and concerning the Swiss Confederation and the subjects of said Confederation, and in the exercise of a general supervising power and author-
10 ity over the consuls, vice-consuls, and consular agents of the said Confederation in the United States. The said office of "*agent politique*," or "political agent," at that time was the office highest in rank known to or established by the Swiss Confederation amongst her representatives in the United States, and the office of consul general is next in rank thereto, and she is advised by counsel and believes, and therefore avers, that said John Hitz was from the said 2d day of April, 1868, and until on or about the said 25th day of June, 1881, continued to be, a public minister within the mean-

ing and purview of section two of article three of the Constitution of the United States, and duly accredited and appointed as such from the Swiss Confederation, a foreign power and government, to the Government of the United States, and that said John Hitz from said date was recognized as such public minister in the United States by the Government of the United States until on or about the said 25th day of June, 1881.

11 At the time when the promissory note and other evidences of debt were made upon which said actions at law were based, and at the time when the said actions at law were instituted, as well as when the judgments thereon were rendered, the said John Hitz was the chief representative in the United States of the Swiss Confederation and such public minister as aforesaid; and she is advised by counsel and believes, and thereupon she avers and charges, that said Hitz was not subject to any jurisdiction or suable in the supreme court of the District of Columbia in manner and form as appears in said actions at law, and that said alleged judgments at law, if they appear of record, as alleged in said bill, are null, void, and of no effect.

She is advised by counsel and believes, and thereupon says, that by virtue of the provisions of the Constitution of the United States original and exclusive jurisdiction over all cases affecting embassadors, other public ministers and consuls, is vested in the Supreme Court of the United States, any statute to the contrary notwithstanding.

12 Further answering the said paragraph of said bill, she says, upon information and belief, that a large number of the promissory notes and other evidences of debt upon which said alleged judgments at law were rendered were given by the said John Hitz for the sole benefit of the said German-American National Bank whilst he, the said John Hitz, was president and one of the managers of that institution, and that it will be inequitable and unjust for the said complainant to recover out of the property any part of said debts, which of a right are the debts of the German-American National Bank.

3. Answering the averments of the third paragraph, this respondent says that she believes that the said John Hitz is insolvent; she admits that she was married to the defendant, John Hitz, as alleged in said paragraph, and that she had children as alleged, but, upon the advice of counsel and belief, she denies that the defendant, John Hitz, became and still is entitled to the rents, issues, and profits of her real property inherited by her, as therein stated.

4. She admits that the property, as described in the fourth paragraph, is correctly set forth; but, upon the advice of counsel,
13 she denies that John Hitz has or had at any time subsequent to the date of the passage of the said "married woman's" act any tenantcy by courtesy or any interest otherwise in the said real estate.

Further answering the said paragraph, this respondent is advised by counsel and believes and, so believing, avers that by decree in this cause made by the general term of this court on the — day of

ments do appear against the said John Hitz they are utterly null and void, because the said supreme court of the District of Columbia had no jurisdiction to entertain any such causes of action or to render any such judgments against the said John Hitz at the time or times when such actions were brought or such judgments were rendered.

She further says, on information and belief, that the parents
8 of the said John Hitz were citizens of the Republic of Switzerland, and that the said John Hitz was an alien and was born in the said Republic, in the year 1828, and that he was never naturalized and never declared his intention to become a citizen of the United States, and that on the 4th day of March, 1864, the high federal council of the Swiss Confederation issued its commission to John Hitz, her husband and one of the defendants in this cause, appointing him consul general of that Confederation "for the United States," and especially for the third district, "comprising the District of Columbia and the States of Virginia, Maryland, and Delaware, and that on the 23rd day of September, 1864, said John Hitz was duly recognized by the Executive Department of the United States as such consul general, and an *exequatur*, in due form, was executed and delivered to him by the United States, and that he was afterwards, and until about the 25th day of June, 1881, recognized as such "consul general" by the United States, and that he continued to perform all the duties appertaining to said pub-
9 lic office of said Confederation in the United States until the 25th day of June, 1881.

On or about the 28th day of February, 1868, the said federal council of the Swiss Confederation issued its credentials or letter of credence, by which it appointed the said John Hitz "political agent," or "*agent politique*," of the Swiss Confederation near the Government of the United States of America, and thereby conferred upon him the title and rank appertaining to that office; that on or about the 2d day of April, 1868, the said John Hitz was duly recognized as such political agent, or *agent politique*, by the Executive Department of the United States, and after that date was so recognized and continued to perform all the duties appertaining to that office in the United States until on or about the 25th day of June, 1881.

The duties appertaining to the said office consisted in the management of all the matters and affairs in the United States, national or diplomatic, commercial or otherwise, appertaining to and concerning the Swiss Confederation and the subjects of said Confederation, and in the exercise of a general supervising power and author-
10 ity over the consuls, vice-consuls, and consular agents of the said Confederation in the United States. The said office of "*agent politique*," or "political agent," at that time was the office highest in rank known to or established by the Swiss Confederation amongst her representatives in the United States, and the office of consul general is next in rank thereto, and she is advised by counsel and believes, and therefore avers, that said John Hitz was from the said 2d day of April, 1868, and until on or about the said 25th day of June, 1881, continued to be, a public minister within the mean-

ing and purview of section two of article three of the Constitution of the United States, and duly accredited and appointed as such from the Swiss Confederation, a foreign power and government, to the Government of the United States, and that said John Hitz from said date was recognized as such public minister in the United States by the Government of the United States until on or about the said 25th day of June, 1881.

11 At the time when the promissory note and other evidences of debt were made upon which said actions at law were based, and at the time when the said actions at law were instituted, as well as when the judgments thereon were rendered, the said John Hitz was the chief representative in the United States of the Swiss Confederation and such public minister as aforesaid; and she is advised by counsel and believes, and thereupon she avers and charges, that said Hitz was not subject to any jurisdiction or suable in the supreme court of the District of Columbia in manner and form as appears in said actions at law, and that said alleged judgments at law, if they appear of record, as alleged in said bill, are null, void, and of no effect.

She is advised by counsel and believes, and thereupon says, that by virtue of the provisions of the Constitution of the United States original and exclusive jurisdiction over all cases affecting embassadors, other public ministers and consuls, is vested in the Supreme Court of the United States, any statute to the contrary notwithstanding.

12 Further answering the said paragraph of said bill, she says, upon information and belief, that a large number of the promissory notes and other evidences of debt upon which said alleged judgments at law were rendered were given by the said John Hitz for the sole benefit of the said German-American National Bank whilst he, the said John Hitz, was president and one of the managers of that institution, and that it will be inequitable and unjust for the said complainant to recover out of the property any part of said debts, which of a right are the debts of the German-American National Bank.

3. Answering the averments of the third paragraph, this respondent says that she believes that the said John Hitz is insolvent; she admits that she was married to the defendant, John Hitz, as alleged in said paragraph, and that she had children as alleged, but, upon the advice of counsel and belief, she denies that the defendant, John Hitz, became and still is entitled to the rents, issues, and profits of her real property inherited by her, as therein stated.

4. She admits that the property, as described in the fourth paragraph, is correctly set forth; but, upon the advice of counsel,
13 she denies that John Hitz has or had at any time subsequent to the date of the passage of the said "married woman's" act any tenantcy by courtesy or any interest otherwise in -he said real estate.

Further answering the said paragraph, this respondent is advised by counsel and believes and, so believing, avers that by decree in this cause made by the general term of this court on the — day of

December, 1883, the rights of this respondent to the rents, issues, and profits of the said property whilst in the hands of the said Keyser is declared and established, and that from said decree and all its provisions this respondent has taken and perfected an appeal to the Supreme Court of the United States, and has filed a supersedeas bond, duly approved, according to the statute in such case made and provided, and she submits, therefore, that this court is without jurisdiction to dispose of any part of the said fund without her consent.

5. Further answering, this respondent says that the said John Hitz never took possession of any of her property so inherited by her otherwise than as her agent and in subordination to her
14 authority, and that separate accounts were always kept of her property, as distinguished from his property, and that he has never asserted any authority in his own right or by virtue of his marital relations over any of her property, either personal or real.

She is informed and believes and therefore avers that the promissory notes and other evidences of debt upon which the alleged judgments at law were procured were made by the said John Hitz during the year 1878, and not before.

And, having fully answered, this respondent prays to be hence dismissed with her reasonable costs and charges.

JANE C. HITZ.

ENOCH TOTTEN,
Sol'r for Mrs. Jane C. Hitz.

DISTRICT of COLUMBIA, *ss:*

I, Jane C. Hitz, being first duly sworn, do depose and say that I am the respondent in the above answer by me subscribed; that I have read the same and know the contents thereof; that the facts therein stated on my own knowledge I know to be true, and as to those matters and things stated on information and belief I believe them to be true.

JANE C. HITZ.

Subscribed and sworn to before me this 21 day of January, A. D. 1884.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR., *Ass't Clerk.*

15 *Answer of R. W. Tyler. Filed Feb'y 4, 1884.*

In the Supreme Court of the District of Columbia, the 5th day of February, 1884. In Equity.

BENJAMIN U. KEYSER, Receiver, etc.,
vs.
JOHN HITZ *et al.*
} No. 6583. Doc. 19.

The answer of Richard W. Tyler to the petition of Benjamin U. Keyser, receiver.

1. This defendant admits the facts stated in the first paragraph.

2. He has no personal knowledge of the facts stated in the second paragraph, but believes them to be true.

3. He has no personal knowledge of the facts stated in the third paragraph, but believes them to be true.

4. He believes that the property mentioned in the fourth paragraph is part of the real estate in which the said John Hitz became tenant by *the* courtesy and entitled to the rents and profits for life, and he is advised that the title of the said John Hitz, as such tenant, [in] and to the said rents and profits, having vested before the passage of the "married woman's act," was not thereby divested.

16 He further says that whether the title of the said John Hitz be as claimed in the said petition, or whether the effect of the "married woman's act" was to divest such title and vest the same in the said Jane C. Hitz, the wife, the conveyances in the proceedings mentioned from the said John Hitz and Jane C. Hitz to Sarah L. Crane, and from the latter to this respondent, in trust to secure William P. Jenks, conveyed to this respondent all the right title, interest, and estate of the said John Hitz and Jane C. Hitz, his wife, in and to the premises mentioned and referred to in the fourth paragraph of the petition; and that, according to the true intent and meaning of the said conveyance to this respondent, the rents and profits of the said premises became security for the debt of the said William P. Jenks, with interest and costs, and vested in this respondent as trustee from the time when default was made under the said deed of trust. And this respondent further says that such default was made on the — day of ——, as set forth in his answer to the original bill in this cause, and that the property conveyed by

17 said deed of trust, owing to the obstructions to the enforcement of the said deed of trust interposed by the petitioner and the said Jane C. Hitz, and the large amount of taxes which have been allowed to accumulate and are now in arrear, will not yield a sum sufficient to pay the debt of the said William P. Jenks, with interest and costs, and that this said respondent claims that the said rents and profits, from and after the said default, are part of the security belonging to the said William P. Jenks. This respondent further says that by the decree made in this cause on the 11th day of December, 1883, the same was retained for the purpose of taking an account of the rents and profits received and which should have been received by the petitioner, both before and since the decree in special term, and the further purpose of enabling the parties claiming the said rents and profits to litigate their respective claims, as by reference to the said decree will fully appear, and that this petition, wherein before such account the petitioner proposes to litigate

18 in relation only to the portion of the said rents and profits received by him under the order in special term, dated the 15th of December, 1881, is an evasion of the said decree, and he is advised that an order should be passed for the taking of the said account and requiring the petition to be amended so as to conform to the said decree. And he prays that such an order may be passed, and as in duty, etc.

RICHARD W. TYLER.

I do solemnly swear that I have read the foregoing answer by me subscribed; that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

RICHARD W. TYLER.

Subscribed and sworn to before me this 5th day of Feb'y, 1884.

[SEAL.] ALBERT HARPER,
Notary Public, D. C.

19 *Motion for an Order for an Account and Distribution by Auditor. Filed Oct.* 30, 1884.

In the Supreme Court of the District of Columbia, Sitting in General Term. October Term, 1884.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ *et al.* } Equity, 6583.

Motion for an order directing complainant to account for rents.

Now comes the defendant, Jane C. Hitz, by her counsel, Enoch Totten, and moves the court for an order referring this cause to the auditor to state the account of Benjamin U. Keyser for rents which have been collected, or which might have been collected, by him out of and on account of the premises mentioned and described and involved in the proceedings in this cause, as well before the order of December 15th, 1881, passed by the special term in this cause, as after said order, and until the possession of said property and premises passed out of his hands, and to state the said accounts,
20 as well in respect of moneys by him paid into court as the moneys remaining in his hands, and to make such allowances as may be proper; and also that said Benjamin U. Keyser be directed to appear before said auditor at such time and times as may be appointed by said auditor, and bring with him such accounts, books, papers, vouchers, and documents as may be in his possession or under his control to enable said auditor to properly state said accounts; and also that said auditor be directed to distribute according to law such funds as may be found for distribution in the cause.

ENOCH TOTTEN,
Counsel for Jane C. Hitz.

Order Referring Cause to Auditor to State an Account and Distribute Fund. Filed Nov. 13, 1884.

In the Supreme Court of the District of Columbia. In General Term, October, 1884.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ *et al.* } Equity No. 6583.

Order referring cause to auditor to state account and distribute the fund.

The motion of Enoch Totten, solicitor for Jane C. Hitz, for reference to the auditor now coming on and counsel having been heard, it is this — day of November, 1884, ordered that the said cause be, and the same is hereby, referred to the auditor of the court to state the account of Benjamin U. Keyser for rents which have been collected, or which might have been collected, by him out of or on account of the premises mentioned and described and involved in the proceedings in this cause, as well before the order of December 15th, 1881, passed by the special term in this cause as after said order, and until the possession of said premises passed out of his hands, and to state said accounts as well in respect of moneys by him paid into court as in respect of the moneys remaining in his hands, and to make such allowances as may be proper.

It is further ordered that the said Benjamin U. Keyser, be and he is hereby, directed to appear before said auditor at such time
22 and times as may be appointed by said auditor and submit his account or accounts, and bring with him such accounts, books, papers, vouchers, and documents as may be in his possession or under his control to enable said auditor to properly state said accounts.

And the said auditor is hereby directed and ordered to report as to the proper distribution, according to law, of such funds as may be found for distribution in the cause, and that in making such distribution he shall inquire and report as to whether or not any taxes should be paid out of said fund; and, if any, how much and for what period or periods of time.

It is further ordered that such audit and distribution shall be made upon the papers, pleadings, proofs, and exhibits used or filed in the cause, and that any party claiming said fund or any part thereof may produce before said auditor such further proof as may be proper to enable him to make the said audit and distribution, which proofs shall be returned with his report.

By the court:

D. K. CARTTER,
Chief Justice.

23 *Report of Auditor. Filed Mar.* 31, 1885. *R. J. Meigs, Clerk.*

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ *et al.*

The following decree was passed in this cause in general term on the 13th of November, 1884:

"Ordered, That said cause be, and the same is hereby, referred to the auditor of this court to state the account of Benjamin U. Keyser for rents which have been collected, or might have been collected, out of or on account of the premises mentioned and described and involved in the proceedings in this cause, as well before the order of December 15th, 1881, passed by the special term in this cause, as after said order, and until the possession of said premises passed out of his hands, and to state said account, as well in respect of moneys by him paid into court as in respect of the moneys remaining in his hands, and to make such allowances as may be proper.

24 "It is further ordered that the said Benjamin U. Keyser be, and he is hereby, directed to appear before said auditor at such time and times as may be appointed by said auditor and submit his account or accounts, and bring with him such accounts, books, papers, vouchers, and documents as may be in his possession or under his control to enable the said auditor to properly state said accounts.

"And the said auditor is hereby directed and ordered to report as to the proper distribution, according to the law, of such funds as may be found for distribution in the cause, and that in making such distribution he shall inquire and report as to whether or not any taxes should be paid out of said fund; and, if any, how much and for what period or periods of time.

"It is further ordered that such audit and distribution shall be made upon the papers, pleadings, proofs, and exhibits used or filed in the cause, and that any party claiming such fund or any part thereof may produce before said auditor such further proof as may be proper to enable him to make the said audit and distribution, which proofs shall be returned with his report."

25 After due notice to all parties in interest, I proceeded to execute this order of reference, and return herewith the deposition and exhibits, together with the account filed by the complainant.

In Schedule A I have stated an account of the rents received by the complainant and the expenditures made by him on account of this property prior to the 15th of December, 1881, showing the balance of the said rents for which the complainant should account as being on hand.

It will be observed by reference to the depositions taken in this reference that the complainant claims to have collected and received these rents in his capacity of receiver of the German-American Na-

tional Bank, a receivership which he held by designation of the proper officer of the Department of the United States Treasury, and he, from time to time, disposed of these balances under direction of the Controller of the Currency, the officer of the said Department having charge of the national banks in such cases.

In Schedule B I have stated an account of the rents collected and received by the complainant from and after the 15th of
26 December, until the decree passed in general term on the 11th of December, 1883, under which decree Richard W. Tyler was authorized thereafter to collect and receive the said rents until the sale of the said real estate. The balances of the rents for this period, between December 15, 1882, and December 11, 1883, have been from time to time deposited by the complainant in the registry of this court, and a statement of such deposits is made in this schedule, which balances this portion of the account.

In both of these schedules I have allowed the complainant the same commissions that would ordinarily be allowed to a receiver or trustee of the court for the collection and disbursements of rents.

It is asserted on the part of other claimants of the fund that the complainant was acting as receiver under designation of the Government, and received a yearly compensation for the discharge of all duties, and to include all responsibilities incident to that position, and that therefore he is not entitled to an additional allowance by way of commissions from this fund.

The fact asserted is true, that the complainant did receive these rents or take possession of them by virtue of his appointment under the Government, and that he did receive an annual stipend
27 as compensation as such receiver, but it does not clearly appear that the ordinary duties of such receiver would include the collection of the rents in this particular case, and I have therefore allowed the complainant the commission above named.

An additional reason for this allowance is found in the fact that, as to a large portion of these rents and during most of the period covered by these accounts he employed agents, or rather continued the employment of agents formerly in charge of the property, and paid in some cases the full amount of the commissions, and in others one-half.

I am next directed to report upon the distribution of the balance of the fund arising from the collection of these rents.

As to the balance found in Schedule A, it not being now in the possession of the complainant, I have not undertaken to make any specific appropriation, leaving that portion of the distribution to be passed upon by the court as involving the relative rights of Mrs. Jane C. Hitz and the complainant.

The rents enumerated in this schedule were collected by the complainant without any authority or appointment from the court,
28 and were taken possession of by him under color of a right or title decreed to be void by the court in general term.

The complainant, having taken possession of the property, filed his bill in this cause seeking to enjoin certain of the defendants from enforcing the provisions of a deed of trust by a sale of the

property, and on the 21st of February, 1879, the court in special term granted the injunction so asked for upon condition that the complainant, as receiver, should execute and file in this cause an undertaking in conformity with the 41st equity rule. An undertaking, executed by the complainant, as receiver alone, was filed, and he proceeded, pending the progress of the litigation, to collect and receive the rents until the decree passed in special term, on the 28th day of November, 1881.

That decree, among other things, directed that the complainant should account to the court for whatever sums of money he might have collected arising out of the said property since the same came into his possession, and that he immediately surrender possession of the said property to Richard W. Tyler, who was thereby appointed receiver, to take possession, rent, and manage the property, and
29 to collect the rents and profits and apply the same, so far as might be necessary, to the payment of taxes, insurance, &c, until the further order of the court.

On the 15th of December following this decree a further order was passed in this cause reciting an appeal to the general term from the decree above-mentioned and ordering the complainant to bring the rents and profits of the said property accruing after the 1st day of December, 1881, into the registry of the court, and to file his bond as receiver of the German-American National Bank in the penalty of $5,000, conditioned for the faithful compliance with the said order, and that thereupon the execution of the decree above-named, so far as it would transfer the property to the receiver therein named, should be stayed until final decision.

Under this order the complainant continued the collection of the rents of the property and deposited the same, as I have stated, in the registry of the court.

The balance of the fund, both that for which the com-
30 plainant is accountable, as per Schedule A, and that which remains in the registry of the court, as per Schedule B, is claimed by William P. Jenks, a party secured by the deed of trust to Tyler of the 18th of June, 1877, upon the ground that the said trust creditor, having been prevented from enforcing his trust and realizing his debt, is entitled to the rents accruing in the meantime.

It has been so uniformly decided by this court that deeds of trust in use in this District do not carry with them any of the rents and profits of the premises conveyed that it is unnecessary for me to cite authority or discuss the proposition. In the case of Shepherd against The Freedman's Savings and Trust Co. and Thompson against Shepherd *et al.*, recently decided by this court in general term, the doctrine, as I have stated it, was reasserted, and in that case the circumstances were rather stronger than in the present one.

The same doctrine has also been held in numerous cases by the Supreme Court of the United States.

It is claimed on behalf of the said William P. Jenks that the fund should be appropriated to the payment of the taxes and as-
31 sessments which have accrued upon this property pending this litigation, and which are unpaid, upon the ground that it

was the duty of the party collecting the rents to have appropriated them to the keeping down of the taxes and assessments and the p-eservation of the security; also upon the further ground that the deed of trust to Tyler authorises the party secured to pay taxes in case of default of the trust debtor, and thereupon the amount so paid and advanced should become and form a part of the principal debt, and be secured in the same manner by the said trust.

From the statement of Richard W. Tyler, made in this reference, it appears that upon the passage of the decree in general term he took possession of this property as receiver and held it in that capacity until the 26th of March, 1884, at which time it was sold under the provisions of the deed of trust of June 18, 1877.

The nett proceeds of this sale fall short $4,745.73 of the amount of the indebtedness to William P. Jenks secured by the trust.

It is urged on behalf of the trust creditor that if, in addition
32 to this deficiency, the said proceeds of sale are to be applied to the payment of taxes and assessments in arrears, and which were liens upon the property, his loss will reach the sum of seven or eight thousand dollars. It is further claimed that, as the rents of this property which should have been appropriated to keeping down these taxes and assessments went into the possession of the complainant, and as the court in general term has decreed the complainant to be accountable for all of these rents, the entire fund arising from these rents, without distinction between that in the registry of the court and that which should be in the hands of the complainant, should be appropriated to the satisfaction and discharge of these taxes and assessments.

Equitably considered, the claim and argument have great force; and if the court have power, it seems to me that the fund in the hands of the complainant, if realized, should be appropriated in the manner claimed, to such extent as might be necessary. This, however, is the extent to which I should make any recommendation in the premises. It is true that under the provisions
33 of the deed of trust the party secured might have paid these taxes and assessments, and thereupon have added them to the amount of his principal debt. The result of such a proceeding would have been to swell the amount of his claim by the sum so paid for taxes and assessments, and if the property at the sale should have realized enough to cover the original debt and these additions, the proceeds would be so applied.

So far as the deed of trust is concerned, the trustee in selling the property had authority to appropriate from the proceeds a sufficient sum to pay all the outstanding taxes and assessments which were liens upon the property, and if the proceeds of sale had been sufficient to pay such taxes and assessment and the original indebtedness and interest, the trust creditor would have been secured from loss.

In this case, however, as in any other case in which the property when sold fails to realize a sufficient sum to pay both the taxes and debt, the trust creditor suffers the loss of the deficiciency, unless in the

present instance the court shall see fit to apply the fund in
34 the hands of the complainant to the discharge of these liens.

I am very clear that I have no authority to appropriate any portion of the fund in the registry of the court arising from the collection and receipt of rents after the 15th of December, 1881, to the payment of the taxes and assessments accruing prior to that date.

As to the taxes and assessments accruing after the 15th of December, 1881, and prior to the date of the decree in general term transferring the property to R. W. Tyler, as receiver, I think they are a proper charge upon the fund in court, being the proceeds of rental for the same period.

There are two reasons which lead me to this conclusion—first, these rents are here subject to equitable disposition by the court, and as a general principle, it may be said that the rents and profits of real estate should be first applied to keeping down all current charges upon the property and protecting and preserving it; but another, and perhaps more available, reason is to be found in the terms of the decree of November 28, 1881, which appointed Richard
W. Tyler receiver of the property, with directions to him to
35 take possession and collect the rents and profits and apply the same to the payment of taxes, &c.

It was evidently the intention of the court, as appears from that decree, to appropriate the accruing rents to the current charges upon the property.

When the decree of December 15th, 1881, was passed suspending the execution of the former decree, it was the evident intention of the court to substitute the deposit of the rents in its registry for the appointment of Tyler as receiver to collect the same, and, I think, it may be fairly assumed to be the intention of the court that the change in the custody of the rents and profits should not change the appropriation directed by the former decree; in other words, that the rents should be applied to the payment of the taxes and assessments accruing during the period of collection of these particular rents.

I have, therefore, appropriated from the fund in the registry of the court, as shown in Schedule B, the necessary sum to pay the taxes and assessments accruing during the period covered by this portion of the account.

The remainder of the fund, after payment of the costs of
36 this reference, is, I think, distributable to Jane C. Hitz under the decrees and opinions of the court in general term, and I have so stated the distribution in Schedule D.

JAS. G. PAYNE, *Auditor.*

37 SCHEDULE A.

Account of Rents Collected and Received by the Complainant Prior to the Order of December 15th, 1881.

Collections.		Disbursements.	
1878.			
December	110 00	Repairs	30 90
1879.			
January	110 00		1 75
February	195 00		
March	205 00		49 00
April	285 45		4 25
May	150 00		30 00
June	205 00		150 00
July	165 00		
August	105 00		
September	180 00		1 75
October	168 00		27 00
November	151 07 158 00		35 69
December	400 27		2 80
1880.			
January	216 00		16 88
February	276 50		38 75
March	214 20		123 75
April	207 00		32 27
May	203 00		1 75
June	205 00		52 75
July	164 00		8 75
August	214 00		3 75
September	254 00		2 99
October	245 00		11 87
November	191 00		
December	228 50		3 50
1881.			
January	203 50		35 45
February	287 00		2 10
March	254 00		12 50
April	224 00		23 25
May	175 00		22 41
June	240 00		151 50
July	166 75		10 00
August	189 50		7 50
September	183 33		
October	193 58		

Schedule A—Continued.

Collections.		Disbursements.	
1881.			
November	228 83	Repairs	20 25
December	334 58		6 40
		Commissions on collections at 10 per cent.	788 60
		Balance	6,175 95
	7,886 06		7,886 06

Balance to be accounted for, $6,175.95.

JAS. G. PAYNE, *Auditor.*

38 SCHEDULE B.

Account of Rents Collected by the Complainant Subsequent to the Order of December 15th, 1881.

Collections.			
1882.			
January	148 58		52 42
February	227 56		77 12
March	230 58		11 50
April	205 58		11 00
May	140 00		12 25
June	210 00		165 50
July	203 91		26 15
August	193 58		9 90
September	171 16		16 95
October	265 50		20 25
November	213 16		11 15
December	221 58		15 65
1883.			
January	180 00		52 10
February	226 00		15 20
March	233 00		11 65
April	170 00		13 50
May	236 75		16 58
June	157 58		35 50
July	269 98		206 35
August	199 91		23 00
September	250 50		23 00

Schedule B—Continued.

Collections.			
1883.			
October	197 58		50
November	213 16		4 38
December	264 00		
1884.			
January	80 13	Commission on $3,905.08 at 5 per cent. (5 per cent. being included in above disbursements as paid to agent)	195 25
Error	60	Commission on $1,205.36 at 10 per cent.	120 53
		Deposited in the registry of the court as follows:	
		465 68	
		728 85	
		1,367 45	
		562 48	
		838 62	
			3,963 08
	5,110 46		5,110 46

JAS. G. PAYNE, *Auditor.*

39 SCHEDULE C.

Account of Taxes and Assessments upon this Property Accruing Prior to January, 1882, *and those Accruing during the Years* 1882 *and* 1883.

First period:

For the year ending June 30, 1878, with interest from August 13, 1878, at 10 per cent. per annum	239 05
For the year ending June 30, 1879, with interest from Nov. 25, 1879, at 10 per cent. per annum	483 68
For the year ending June 30, 1880, with interest at 10 per cent. per annum from Oct. 1, 1880	467 30
For the year ending June 30, 1881, with interest from Sept. 27, 1881, at 10 per cent. per annum	467 30
For the half year ending Dec. 31, 1881, with interest at 10 per cent. per annum	233 65
	1,890 98

Second period:

For the half year ending June 30, 1882, with interest from Sept. 26, 1882, at 10 per cent. per annum	233 65	
For the year ending June 30, 1883, with interest from Sept. 25, 1883, at 10 per cent. per annum	467 30	
For the half year ending Dec. 31, 1883, with interest from Sept. 23, 1884, at 10 per cent. per annum	209 86	
		910 81
		2,800 79

JAS. G. PAYNE, *Auditor.*

40 SCHEDULE D.

Distribution of the Fund in Registry of the Court Deposited by the Complainant.

Amount of deposits			$3,963 08
To clerk's allowance as poundage		39 63	
auditor's fee, this account and report		35 00	
depositions		25 00	
Taxes and assessments as follows:			
For half year of 1882	233 65		
Interest to May 1, 1885	60 67		
		294 32	
For 1882 and 1883	467 30		
Interest to May 1, 1885	74 76		
		542 06	
For half year of 1883	209 86		
Interest to May 1, 1885	12 65		
		222 51	
Jane C. Hitz, the balance		2,804 56	
		$3,963 08	$3,963 08

JAS. G. PAYNE, *Auditor.*

[In pencil:]

39 63		
35 00		
25 00		
	99 63	
294 32		
542 06		
222 51		
	1058 89	
	$1,158 52	
	3,963 08	
	1,158 52	
	$2,804 56	

41 DECEMBER 5TH, 1884.

Hearing pursuant to adjournment.

Present: B. U. Keyser, in person, and R. D. Mussey, Esq.

Mr. KEYSER sworn, and is examined by Mr. MUSSEY.

Q. Please state whether this account is a true and correct account of the rents of the 9th & G streets property, so called.

A. It is.

Q. State whether about the 30th of October, 1878, you were acting as receiver of the German-American National Bank under appointment by the Treasury Department, and whether you are still so acting.

A. I was and am.

Q. As such were you and are you in receipt of a regular salary or annual allowance?

A. I was and am.

Q. I notice in this account sundry items of commission of 10 per cent. for which you claim credit; what are they for, and to whom were they paid?

A. After the failure of the bank, John Hitz, who had been collecting the rents, instructed his agent, John Sherman, to turn them over to me. This was early in November, 1878. John Sherman had been in the habit of receiving from Hitz for his services a commission of 5 per cent. on his collections. The services of Sherman con-

42 tinued at the same rate of commissions, and I have charged for my own services and responsibility and advice a further commission of 5 per cent., it being a duty extra and beyond my regular duties as receiver of the German-American National Bank.

Q. During the time you were in possession of this property did you make any payment on account of taxes?

A. I did not.

Hearing adjourned subject to notice.

43 WEDNESDAY, *January* 31*st*, 1884.

Hearing pursuant to adjournment.

Present: Col. Totten, of counsel, and Mr. Keyser, a witness.

Mr. B. U. KEYSER, being recalled, produces the vouchers in support of his accounts heretofore submitted to the auditor, and is thereupon interrogated by Col. Totten, counsel for Mrs. Hitz.

Q. You have in your hands, Mr. Keyser, a package of vouchers; are you ready to submit those to the auditor for his examination?

A. I am.

Q. Are those in support of the account which you have rendered?

A. They are.

Q. Are they each and all of them just and true?

A. Each and all of them are just and true.

Q. What is the condition of the fund in your possession? You have part of it in the hands of the court. All that was collected by you

under the order of Judge Wylie, special term, authorizing you to collect the money, is in the hands of the court?

A. Yes, sir.

Q. Where is the rest of it?

44 A. The rest of it is in the hands of the creditors of the German-American National Bank.

Q. In what way?

A. It was turned in to the Controller of the Currency of the Treasury of the United States and has actually been distributed.

Q. Controller of the Currency?

A. Yes, sir.

Q. Are you sure of that fact?

A. Perfectly; it is an actual fact.

Q. By what authority did he do that; do you know?

A. It was his duty to distribute all funds that came into his hands.

Q. Why do you say so?

A. The law makes it his duty.

Q. The money to which you refer was the amounts collected by you out of that property on the corner of 9th and G, in controversy in this case?

A. Yes, sir.

Q. Between the time when you got possession of it from John Hitz and the time Judge Wylie required you to go to the court, that, you say, has been distributed by the Controller of the Currency?

A. I say so.

Q. Then out of what money is this balance found due in

45 your hands to be paid? You report a balance here of some several thousand dollars.

A. That is in the hands of the court.

Q. That amounts to how much, according to your account?

A. I don't recollect.

Q. Between five and six thousand dollars?

A. I think so.

Q. How far back do your accounts go?

A. My accounts commence—the first collection is December 9th, 1878.

Q. That runs down now to what period?

A. That runs down to February, 1881.

Q. Then why hadn't you closed the account there?

A. I didn't close it here; I just left it open to show the amounts of the collections; the balance between this and the amount of disbursements was remitted to the Controller of the Currency.

Q. What was the balance?

A. $6,067.

Q. That is between December, 1878, and February, 1881?

A. Yes, sir.

Q. You collected on this property about $6,000?

A. Yes.

Q. And handed it over to the Controller of the Currency?

A. Yes, sir; I did.

46 Q. And he then distributed that to the creditors of the bank?

A. Yes, sir.

Q. Have you any control over that money?

A. No, sir.

Q. Or any other money in lieu of it?

A. I have not.

Q. How are you to pay a judgment or a decree against you collected between December 8th and February, 1881?

A. That is a conundrum.

Q. Which you are not prepared to answer. How much money has the German-American National Bank gotten now to its credit through its receiver?

A. Nothing; it is in debt.

Q. Absolutely nothing?

A. Absolutely nothing.

Q. Was the Controller of the Currency aware of the fact that this property was in controversy?

A. I don't remember that he was.

Q. You instituted this bill originally yourself?

A. Yes, sir.

Q. Where is your authority?

A. I presume it is in my possession.

Q. I shall have to ask you to produce it at our next hearing.

A. I think I have such written authority.

47 Q. When was this $6,000 and odd dollars deposited by you?

A. As collected, with my other rents.

Q. From time to time?

A. From time to time.

Q. With other rents?

A. Yes, sir.

Q. Was there any memoranda made by you touching the fact that there was a controversy in regard to this property?

A. No.

Q. Did you assume that they belonged to the creditors of the bank?

A. Yes, sir.

Q. That you had a right to distribute it in this way?

A. Yes, sir.

Q. What part did you have in making this distribution, if any?

A. I was the mere agent of the Controller of the Currency in paying the dividends by his checks; it was deposited in the U. S. Treasury and he gave me his checks to pay the dividends. I would like to say here that I distributed these rents as the property of John Hitz coming into my hands, by his direction. I have so stated before, and I gave a history of how I came into possession of these rents.

Q. What directions did you have from John Hitz?

48 A. John Hitz, being indebted to the bank actually and in —, I think you lawyers call it, handed over to me all of his own property to secure his indebtedness to the bank as a share-

holder, and among other property he handed me he directed the John Sherman, who had previously collected the rents for him, to turn them over to me, and so informed me that he had directed Sherman to turn those rents over to me, and Sherman did so, as the property of John Hitz, and have been credited to John Hitz on his individual liability.

Q. All of it?

A. All of it down to this point.

Q. To what dates?

A. February 1st, 1881; the balance I haven't credited to him because I have not got them. They have been turned into court.

Q. Now, was John Hitz' direction to you in writing or verbally?

A. He did not give me any directions; he gave John Sherman directions to pay these rents to me, and so informed me verbally, with a memoranda of the rents.

Q. Did you have any directions from Mrs. Hitz at all?

A. I have none; no, nor any protest from her.

Q. She had no information about it, did she?

A. Not that I know.

49 Q. Well, you are aware that Mrs. Hitz filed a cross-bill in this case?

A. Yes, sir.

Q. And that she made a fight, more or less vigorous, about it?

A. Yes, sir; I recollect that.

Q. Well, now on the 10th of January, or about that time, 1874, you filed a bill in this court in this case, which is the original bill, to stop Jenkins from selling this property under the deed of trust?

A. Yes, sir.

Q. You, at that time, were required, prior to getting your injunction order, as a necessary precedent, to give bond for damages, were you not?

A. I believe so.

Q. Who signed that bond?

A. I don't recollect.

Q. Where is the bond?

A. In the court papers, I presume.

Q. Do you not remember who signed that bond?

A. I signed the bond, of course.

Q. As receiver?

A. Yes, sir.

Q. Who signed it as surety?

A. Nobody that I know of; I think there was no surety to it; I am not positive about that.

50 Q. Upon the filing of the bond, whatever it may be, your restraining order was issued by Judge MacArthur, was it not?

A. I don't recollect.

Q. And that stopped the proceedings to sell?

A. For Jenkins, yes.

Q. Did this money that you paid over Dec., 1878, collected be-

tween that time and Feb., 1881, was it all collected by John Sherman?

A. Every dollar.

Q. Then John Sherman continued in charge of the property, as the agent for collecting rents, under your administration in the same way that he had done prior to that time?

A. Precisely.

Q. You have no knowledge whether Mrs. Hitz had anything to do with that transaction of turning over the collection of rents to him or not?

A. I have not.

Q. And all that you have from John Hitz himself was verbal?

A. Yes, sir; he had informed me that he had directed John Sherman to pay those rents to me.

Q. And John Sherman did so?

A. He did so.

Q. And you received them?

A. And I received them.

Q. And you turned them over to the Controller of the Currency?

A. I turned them over to the Controller of the Currency.

51 Q. And when you got them paid you gave him credit to the German-American National Bank on his debts?

A. Yes, sir.

Q. And sent the money to the Controller?

A. Yes, sir.

Q. And the money became the property of that bank?

A. Yes, sir.

Q. And that's the end of it?

A. Yes, sir; so far as I know.

Q. Do you think you can furnish us with the authority from the Controller of the Currency to institute these proceedings?

A. I think it possible.

Q. Well, he did write you a letter directing you to do so?

A. I think he did.

Q. If he did, you have got that letter or order of record in the treasury?

A. No; it is not in writing; it was oral. I have it in his handwriting.

Q. Did you not have some written instructions and directions from the Controller of the Currency about this fund and about the disposition thereof; in other words, telling you what to do with them and how to preserve it from the Controller of the Currency,

52 at the time the security was required by the special term as a preliminary to issuing the restraining order against Jenks?

A. That I don't recollect.

Q. Well, I will tell you; my recollection is that he did give some directions to husband this money and to hold it up for the purpose of answering any disposition the court might make about it and any orders the court might make in reference to its disposition; do you remember that?

A. You are perfectly correct, except that that instruction was with reference to my becoming an officer of the court.

Q. Under Judge Wylie's order?

A. Yes, sir; that was the instruction from the Department to keep that separate and pay it into the court as required, and I was authorized to enter into a bond as receiver with that condition; that condition I have observed. You will understand that I answer negatively your first question.

Q. You deny there was any instruction given you in regard to the disposition of these rents at all by the special term of this order authorizing you to collect the rents and requiring you to turn them over to the court?

A. Yes, sir.

53 Q. All that was done by you with reference to the collections prior to that time was done without any instruction?

A. That is my recollection.

Q. Now, how much money have you collected since that date, in February, 1881?

A. I have collected $5,110.44.

Q. How much is the balance shown by that account?

A. $3,963.08.

Q. That is the balance remaining and that is in the hands of the court?

A. Yes, sir.

Q. And the other money prior to that is "gone where the woodbine twineth?"

A. It "are."

Q. When you were appointed receiver of this money fund did you have a bond?

A. I did.

Q. Who signed it?

A. That is a bond given by Wm. G. Metzerott and John S. (McKeldon) McClelland.

Q. The whole is insolvent, isn't it, beyond any question?

A. No, sir.

Q. Metzerott is dead?

A. Yes, sir; when I say John C. is not insolvent, because I think he is not insolvent.

Q. Well, that is, bordering on that condition?

A. Yes, sir; verging.

54 Q. He is very old and feeble?

A. Yes, sir; and has the rheumatism.

Q. Did Mr. Sherman collect all these rents for you?

A. I think he collected every dollar of it.

Q. From before February or after?

A. Entirely.

Q. And he was allowed 5 per cent. by you?

A. Yes, sir; and I charged an extra 5 per cent. for my care and superintendency,

Q. You were acquainted with the contents of Mrs. Hitz' answer to this bill, and also her cross-bill, were you not?

A. I heard of it at the time; yes.
Q. Has the German-American National Bank any assets left?
A. It has one piece of property.
Q. Where is it located?
A. It is No. 1317 K street southeast.
Q. Is that what was known as John Hitz' residence?
A. No, sir.
Q. Do you know the number of the lot and square?
A. No, sir; I have given you the number.
Q. The title is in whom?
A. Me, the receiver.

Q. It was one of those pieces of property conveyed by John
55 Hitz?

A. No, sir; it is a piece of property that was conveyed to me by a man named George A. Scott, it having been pledged to the bank as security for a note; it is the remnant of that property.
Q. How much is the property worth that you hold?
A. I should suppose $500 a year.
Q. Not more?
A. No more.
Q. Does that constitute the entire sum of the assets that belong to that bank now?
A. With the exception of some little odds and ends of furniture; probably a $100 worth; not much more.
Q. The collections are pretty much all made, are they?
A. Yes, sir. I might say here that I have a case in the interest of the creditors of the bank amounting to some $5,000, which is in the hands of William F. Mattingly, in the shape of a suit against Thos. L. Tullock, as collector of internal revenue. The commissioner of internal revenue taxed that bank $5,000 on its deposits; the money was paid. Commissioner number 2 following, reviewing the case, decides that the payment was erroneous, that the bank was not liable figure on deposits, and the money was refunded.
56 Commissioner number 3 comes in and says number 2 is wrong and number 1 right, and that the money must be paid. It was paid under protest, and the bank has been suing ever since to get that money back, and it has never come to trial.
Q. Where is it pending?
A. In this court.
Q. What is the title of the case?
A. It is the German-American National Bank against Thos. L. Tullock, or somebody substituted in his place; I have forgotten who.

As to the authority to institute these proceedings Mr. Keyser states that he "conversed with the Controller, and that he orally sanctioned the commencement of that suit a year ago;" authorized the employment of my attorney, because that was the first suit I had; I think the very first. The employment of the attorney was sanctioned by letter.

Q. You have that letter?

A. O, yes; I have the letter. I will look at it, and if there is anything in it which authorizes the suit to be commenced you you shall have it.

Q. It authorizes you to employ Messrs Robinson and Elliott?

A. No; Elliott, as my general attorney.

57 SATURDAY, *January* 31*st*, 1885.

Hearing pursuant to adjournment.

Present: Col. Totten, and Mr. John Sherman, a witness.

JOHN SHERMAN sworn, and examined by Col. TOTTEN.

Q. What is your name?

A. John Sherman.

Q. What is your business?

A. Real estate.

Q. How long have you been engaged in that business?

A. Since the spring of 1878, I guess.

Q. Did you have anything to do, prior to 1878, with the property on the corner of 9th and "G" streets northwest, involved in this controversy?

A. Prior to 1878?

Q. Yes, sir.

A. I think not prior.

Q. 1878? When was the first time you took charge of it? When did you first take charge of it?

A. My recollection is that it was in the spring of 1878.

Q. You were in charge of it when the German-American National Bank failed?

A. Yes, sir.

58 Q. It failed on the 30th of October, 1878?

A. About that time.

Q. For whom were you collecting the rents at that time?

A. John Hitz.

Q. John Hitz or his wife?

A. John Hitz.

Q. Were you collecting rents——

A. You asked me, at the time of the failure?

Q. Yes.

A. Well, I will say that was in October.

Q. On the 30th day, I think?

A. Yes, sir; I think probably I paid the rents for October to Mrs. Hitz.

Q. About the time of the failure of the German-American National Bank, was there any change in the arrangement, so far as you were concerned, as to the disposition of the rents?

A. I ought to be correct about the month; it was October 9th. My impression is it was October that I paid Mrs. Hitz. The date is so close together it is little hard to speak correctly. My impression is, however, that the rent prior to the failure—no, no, no. I

think I will change that; at the time of the failure, I think, I was paying them to Mr. Hitz.

Q. Then, what did you do?

59 A. There was one month during which I paid to Mrs. Hitz.

Q. What month was that?

A. I think it was the month of November.

Q. Then some time about the 1st of November the property was turned over by John Hitz to Mrs. Hitz, was it?

A. Well, I wouldn't like to say it was the 1st of——

Q. Well, about that time?

A. Yes, sir.

Q. The day is fixed, I think, in this record.

A. Yes, sir.

Q. It was soon after the failure of the bank, wasn't it?

A. Yes, sir.

Q. Well, you have had a good many other pieces of property for which you were collecting rents for Mrs. Hitz?

A. Not now.

Q. Didn't Mr. Hitz turn over the Metzerott Hall at the same time and paid money to Mrs. Hitz and not to him?

A. I couldn't say it was just at that time; I thought there was a difference in the time.

Q. It was the earlier.

A. I think the 9th and G property——

Q. That was the first?

A. Yes, sir; that is before the Metzerott Hall.

60 Q. Now, have you attorned to her for the property on the corner of 9th & G streets in controversy; how long did you keep it for Mrs. Hitz?

A. I think it was one month.

Q. Well, what did you do with it?

A. Paid it to Mr. Keyser.

Q. Now, I wish you would state as distinctly as you can by what authority you began to attorn to Mr. Keyser, and at what date?

A. I couldn't give you the date exactly without looking at the books; but my impression is I began with the month of December to pay to Mr. Keyser, and my impression is upon direction of Mr. Hitz.

Q. Mr. Hitz?

A. I think it is.

Q. Did you have your directions in writing or verbally?

A. Verbally, is my impression.

Q. Verbally from Mr. Hitz?

A. My impression is it was the verbal direction of Mr. Hitz.

Q. Well, did you ever get any authority from Mrs. Hitz to turn it over at all, that you know of?

A. I don't remember that I did.

Q. Can you state whether the authority from Hitz was in writing or verbally?

61 A. I think it was verbal.

Q. Have you searched for the written authority and do not find it?
A. I have.
Q. Have you made diligent search?
A. Very careful search.
Q. Did Hitz give you this direction (if he gave it to you) in your office, or where?
A. That would be hard to say. Until the bank failed, I met him frequently in the bank; but as this was afterwards (after the failure), I would not have met him then, and it was an accident if it was anywhere else but in my office.
Q. Well, ever since that time, did you attorn to Keyser?
A. For the 9th & G property?
A. [Q.] Yes.
A. During the time it was in my possession I did.
Q. When was it taken out of your possession?
A. That is more than I can say without referring to the books.
Q. Well, about when?
A. Two months ago.
Q. By whom?
A. By direction of Mr. Keyser.
62 Q. But that was after the time Mr. Tyler took possession of it?
A. Yes, sir.
Q. The receiver. You kept charge of that property and attorned to Keyser from whatever date it was in 1878 down to the time that Tyler got possession of it?
A. Yes, sir; it passed from me to Tyler.
[Q.] This is getting in this suit. Of course you cannot state here how much money you paid to Keyser; but all the money you got out of the property you paid over to him?
A. That is correct.
Q. Is that governed by his process in the matter of collecting the rents?
A. Yes; that I find in writing.
Q. Have you had any conversation with Keyser lately about it?
A. I have.
Q. When?
A. I met him one day incidentally at Metzerott's store.
Q. Whose?
A. Metzerott's.
Q. The music store on Pennsylvania avenue?
A. Yes, sir; and he twilted about the matter some way or other; I forget just now——
Q. What did he say?
63 A. Let me see; it is hard to say just what he did say; but jocularly asked me "how it was about 9th and G," I think, or something of that kind; or "how it was about Mrs. Hitz property on 9th and G," or something like that.
Q. Well, he was talking about rents, wasn't he?
A. Yes, sir; and then, as he had opened the question, I asked him what I wanted to do before—but what I had not felt at liberty

to do—what authority I had in regard to my transaction in the matter.

Q. And what did he say?

A. He said it was from Mr. Hitz.

Q. Well, what did he say about the money which you had paid over to him? Did he tell you what became of it; what he did with it?

A. He either did at that time or subsequently speak of having paid the money into the Treasury of the United States, or to the Treasurer of the United States.

Q. Did he tell you what became of it?

A. I cannot say, Col., that he did; no, I wouldn't say.

Q. Did he say anything about having "got ahead of Mrs. Hitz at last in one thing?"

A. No.

64 Q. He did not? Did he regard it apparently as a good joke that he had got away with this money—got it into the hands of the creditors?

A. No; it did not strike me so.

Q. How did it strike you?

A. That he had put it beyond his control, and that, taken in connection with my knowledge of the fact, *that* it was now beyond his control.

Q. He regarded that as a good joke on Mrs. Hitz, did he not?

A. No; he did not put it in that light, Col.

Q. If he did I want to know it.

A. No; I did not think there was any such remark made or anything like it.

Q. Did he say anything about the condition of the case, so far as he was concerned; his authority as receiver, to you?

A. No, sir.

Q. He made no jocose remarks about that; did not touch on the subject at all?

A. I don't think he did refer to it at all.

Q. Well, that is about all I want to ask you.

A. I merely wish to qualify as to dates there; it may have been a few days either way. You asked me just when it was, November or December.

Q. You had the property in charge for Mrs. Hitz at the time you turned it over to Mr. Keyser?

65 A. That is my understanding about it.

Q. Your recollection is that you turned it over to Keyser because Hitz told you to?

A. I cannot say that is my impression, Col.; I may arrive at it by way of argument, but it is my impression that at the time there was considerable going on; my impression is that it was a verbal direction by Mr. Hitz, I cannot recall; but it conforms to the case, and I may arrive at that impression by way of argument, thinking it over—supposing I would do so; but it is my impression Mr. Hitz gave me verbal direction first as representing the property himself. Afterwards he delivered some to Mrs. Hitz; and that is

the whole list of property he gave me when he went to Europe. He gave me a list of the property to collect, and then, when he directed me after these troubles to pay some to Mrs. Hitz, some still went from him for several years.

Adjourned to Tuesday at 1.30 o'clock.

66 TUESDAY, *February 4th*, 1885.

Hearing pursuant to adjournment.

Present: Col. Totten, for Mrs. Hitz, and Mr. R. D. Mussey.

JOHN HITZ sworn, and examined by Col. TOTTEN.

Q. What is your name?

A. John Hitz.

Q. Are you the same John Hitz who testified in this cause long ago before the final judgement of the courts upon it?

A. I am.

Q. You are acquainted with the property on the corner of 9th & G streets, are you not?

A. I am.

Q. Can you state to the auditor at what date you turned the property over to your wife, Jane Hitz; or rather, at the time when you ceased to collect the rents or have anything to do with it—the rents for that property?

A. If my memory serves me right, it was in the month of October or November; at all events, in the latter part of 1878.

67 Q. Well, how long after the failure of the German-American National Bank did you do this?

A. That I am unable to say at present.

Q. Was it long after?

A. The question before—" long after " did I cease to collect the rents?

Q. Yes, sir. Did you cease to collect the rents a long time after the failure of the bank or a short time?

A. Very short.

Q. Very short? Well, a week or two weeks?

A. Within a month.

Q. Yes. Who collected the rents for you immediately after you left your control of the property?

A. The rents were usually collected by John Sherman.

Q. Did you give John Sherman any instructions, in writing or verbal, as to the person to whom he should attorn?

A. I am unable to say; I usually did so in writing; it is an exceptional thing if I did so verbally.

Q. Mr. Keyser, in testifying here in this matter, stated substantially that the property, or the possession of it, was turned over to him by you personally. Do you know anything about that?

68 A. I don't remember the circumstances of his getting possession of that property. At the time I was without legal advice.

Q. Well, if you turned the property over to Mrs. Hitz or told

Sherman to attorn to her, would it refresh your memory to consider that in connection with this question I just asked you?

A. Just state that again.

Q. You have stated that, in your testimony just now, you ceased to collect the rents of this property and had nothing more to do with it after a short time subsequent to the failure of the bank, and that John Sherman was to attorn to Mrs. Hitz. Now, that being so, would you have turned it over to Keyser?

A. It is possible that I may have turned it over to Keyser, but it is not probable that it was done without some paper or writing.

Q. Have you made search for any such paper?

A. I have.

Q. With what success?

A. I have found no paper of the kind. The only paper I found relating to the transfer of rents was from Mr. Keyser to Mr. Sherman; but my usual habits in such matters would lead me to

69 believe that if I gave authority under the circumstances I would have given it in writing to Keyser, upon which he based his letter to Mr. Sherman.

Q. Will you look at that paper and see if that is your genuine signature?

(Hands witness a paper.)

A. That is my signature.

Q. You executed that paper and delivered it, did you?

A. Yes, sir.

Col. TOTTEN: I offer that in testimony, Mr. Auditor.

Paper is marked Exhibit John Hitz No. 1.

Col. TOTTEN: I offer two other deeds in evidence; one is a deed from John Hitz to Enoch Totten, and the other is a deed from a man by the name of Richard W. Tyler to Seth Colwell, which is a conveyance made in pursuance of a sale purporting to have been made under a deed of trust.

Papers marked Exhibits A and B (auditor's exhibits).

JOHN HITZ.

70 Copy.

Deed in Trust. John Hitz et ux. to Enoch Totten, Tr. Recorded March 9, 1881, 3.10 *p. m.*

Liber No. 963, folio 143, *et. seq.*

This indenture, made this first day of March, in the year of our Lord one thousand eight hundred and eighty-one, between John Hitz and Jane C. Hitz, his wife, of the first part, and Enoch Totten, trustee, party of the second part, all of the District of Columbia, witnesseth:

That for and in consideration of certain conveyances heretofore made and delivered and hereafter to be made and delivered, and in

consideration of other valuable considerations had and received by the said John Hitz before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, said parties of the first part have granted, bargained, sold, and conveyed, and do by these presents grant, bargain, sell, and convey, unto the said party of the second part, his heirs and assigns, all their right, title, interest, and estate of, in, and to those several pieces and parcels of ground situated and lying in the city of Washington, in the District aforesaid, described as follows, viz., all of lot numbered three (3) and the west thirty (30) feet front, and running back with that width eighty-seven (87) feet in depth, of lot numbered two (2), in square numbered four hundred and five (405), as the same are known and described upon the plat or plan of said city of Washington; and also
of, in, and to all the pieces and parcels of land, of whatsoever
71 kind or description and wheresoever situated, of which Michael Shanks died seized, and which they have not heretofore lawfully conveyed, together with the improvements and appurtenances to all said granted premises belonging or appertaining; to have and to hold the same unto and for the only use and behoof of the said party of the second part, his heirs and assigns, forever, in trust, nevertheless, for the sole [and] separate use and benefit of the said Jane C. Hitz for and during the term of her natural life, free from the control of her husband and from any liability for his debts, and to permit her to have the possession, use, and income of said premises, and further to lease, sell, mortgage, convey, and otherwise dispose of such premises, or any part thereof, in such manner and for such interests and estates as she may direct and appoint by her instrument of writing under her hand and seal and attested by two witnesses, and whether such direction and appointment be of a testamentary character, to go into effect after her death, or otherwise, and in remainder after her death, in the absence of any such direction and appointment or subject thereto, to hold the said premises for the use of the children of said Jane C. Hitz living at the time of her death and the children of any deceased children, so that the latter shall take the same share in said property which their parents would take if living, their heirs and assigns, forever.

72 I- testimony whereof the said parties of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

JANE C. HITZ. [SEAL.]
JOHN HITZ. [SEAL.]

Signed, sealed, and delivered in the presence of—
HUGH T. TAGGART.

DISTRICT OF COLUMBIA, }
County of Washington, } *ss:*

I, Hugh T. Taggart, a justice of the peace in and for the county aforesaid, do hereby certify that John Hitz and Jane C. Hitz, his wife, parties to a certain deed bearing date on the first day of March, in the year eighteen hundred and eighty-one, and hereto annexed,

personally appeared before me, at the county aforesaid, the said parties being personally well known to me as the persons who executed said deed, and the said John Hitz acknowledged the same to be his act and deed; and the said Jane C. Hitz, being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this third day of March, A. D. 1881.

HUGH T. TAGGART, [SEAL.]
Justice of the Peace.

73 Copy.

Deed. Richard W. Tyler, Tr., to Seth Caldwell, Jr. Recorded March 27, 1884, 1 p. m.

Liber No. 1073, folio 323, *et seq.*

Whereas default having been made in payment of debt mentioned in a certain deed of trust from Sarah L. Crane, bearing date the eighteenth day of June, A. D. 1877, and recorded in liber No. 857, fol. 411, *et seq.*, of the land records of the District of Columbia, Richard W. Tyler, the trustee named in said deed of trust, in strict execution of the power in him vested in and by said deed, and after having fully complied with all the requirements of said deed of trust, did, on the 26th day of March, A. D. 1884, in front of the premises, and pursuant to due notice, as required by said deed of trust, expose to public sale the lands and parcels of ground hereinafter particularly described, when and where one Seth Caldwell, Jr., being the highest bidder, became the purchaser of said lands and premises at and for the sum of twenty-nine thousand two hundred dollars ($29,200); and whereas the said Seth Caldwell, Jr., having fully complied with the terms of said sale and paid the whole of the purchase-money in cash, hath become entitled to a conveyance of the land and premises so as aforesaid sold:

Now, therefore, this indenture, made this 27th day of March, in the year of our Lord one thousand eight hundred and eighty-four, between said Richard W. Tyler, as trustee aforesaid, of the
74 District of Columbia, of the first part, and Seth Caldwell, Jr., of Philadelphia, in the State of Pennsylvania, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the recited premises and the sum of ten dollars, current money of the United States, to him in hand paid by the party of the second part, the receipt of which, before the ensealing and delivery of these presents, is hereby acknowledged, hath granted, bargained, and sold, aliened, conveyed, and confirmed, and by these presents doth grant, bargain, and sell, alien, enfeoff, convey, and confirm, unto and to the use of the said party of the second part, his heirs and assigns, forever all those certain pieces or parcels of land and premises

situate and being in the city of Washington, District of Columbia, and known and distinguished as all of lot numbered three (3) and the west thirty (30) feet front, and running back with that width eighty-seven (87) feet in depth, of lot numbered two (2), all in square numbered four hundred and five (405), with all buildings and improvements thereon, together with the rights, easements, privileges, and appurtenances to the same belonging, or in anywise thereto appertaining; to have and to hold the said land and premises, with the appurtenances and hereditaments to the same belonging, unto and to the only use and benefit of said party of the second part, his heirs and assigns.

In testimony whereof the said party of the first part hath
75 hereunto set his hand and seal as trustee aforesaid the day and year above-written.

RICHARD W. TYLER, *Trustee.*

Signed, sealed, and delivered in the presence of—
JOSEPH S. RIDER.

DISTRICT OF COLUMBIA, *To wit:*

I, Joseph S. Rider, a notary public in and for the District aforesaid, do hereby certify that Richard W. Tyler, trustee, party to a certain deed bearing date on the 27th day of March, A. D. 1884, and hereto annexed, personally appeared before me, in the District aforesaid, the said Richard W. Tyler being personally well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this 27th day of March, A. D. 1884.

[NOTARIAL SEAL.] JOSEPH S. RYDER,
Notary Public.

76 *Assignment.*

In the Supreme Court of the District of Columbia. General Term, October, 1884.

BENJAMIN U. KEYSER, Receiver,
vs.
JANE C. HITZ *et al.*, Defendants. } Eq. No. 6583.

For and in consideration of the sum of one ($1.00) dollar and other valuable and good considerations to me in hand paid by Jane C. Hitz, before and at the time of the delivery of these presents, I hereby assign, sell, transfer, and set over to the said Jane C. Hitz all my right, title, and interest in and to the rents, issues, and profits now in the hands of the complainant, Benjamin U. Keyser, either as receiver or otherwise, collected or received in any manner whatsoever out of or from the premises involved in this cause and situated on the corner of Ninth and "G" streets, in the city of Washington, being lot number three (3) and the west thirty (30) feet of lot number two (2), in square number four hundred and five (405), in said city; and all my right, title, and interest to any other rents in

77 the hands of said Benjamin U. Keyser, for which he is accountable herein. The true intention of this instrument is to convey to said Jane C. Hitz all my right, title, and interest in and to the rents, issues, and profits and the fruits, of whatsoever name or nature and wheresoever situated, of the property, real, personal, and mixed, inherited by the said Jane C. Hitz from her father, Michael Shanks.

Witness my hand and seal, at the city of Washington, this 30th day of October, A. D. 1884.

JOHN HITZ. [SEAL.]

Witness:
W. B. WEBB.

78 In the Supreme Court of the District of Columbia, the 1st day of March, A. D. 1879.

KEYSER, Receiver,
vs.
TYLER *et al.*
} No. —. Ex. Doc. —.

The plaintiff hereby undertakes to make good to the defendants all damages by them jointly or severally sustained by reason of the plaintiff's having wrongfully and inequitably sued out the writ of injunction or the restraining order heretofore issued in this cause, and stipulates hereby that the said damages may be ascertained in such manner as the justice shall direct; and that, on dissolving the injunction, he may give judgment thereon against the plaintiff for said damages in the decree itself dissolving the injunction.

B. U. KEYSER, *Receiver.*

Filed March 4, 1879.

79

1878.

DISTRICT OF COLUMBIA,
Nov., 1884.

Items of sale:

To 2d ½ of tax for year ending June 30, 1878	$225 05
To penalty	13 50
To advertising, 1878	40
To auctioneer's fee	10
Amount sold for	$239 05

1878. Tax book, folio 123, of lot- 2 & 3, square No. 405.

To amount sold for taxes August 13, 1878, assessed in name of Michael Shanks	239 05
Interest at the rate of ten per cent. per annum from day of sale to date of redemption	
Amount required to redeem	

Receive- payment.

——, *Collector.*

T. D.

Auditor's Coupon.

1878.

DISTRICT OF COLUMBIA,
Nov., 1884.

Items of sale:

To 2d ½ of tax	$225 05
To penalty	13 50
To advertising, 1878	40
To auctioneer's fee	10
Amount sold for	$239 05

1878. Tax book, folio 123, of lot- 2 & 3, square No. 405.

Am't sold for taxes Aug. 13, '78, assessed in name of M. Shanks	239 05
Interest at 10 per ct. pr. annum from date of sale to date of redemption	
Am't required to redeem	

80 1879.

DISTRICT OF COLUMBIA,
Nov., 1884.

Items of sale:

To all of tax for year ending June 30, 1879	409 47
To penalty	73 71
To advertising, 1879	40
To auctioneer's fee	10
Amount sold for	$483 68

1879. Tax book, folio 426, of lot- 2 & 3, square No. 405.

To amount sold for taxes Nov. 25, 1879, assessed in name of Sarah L. Crane	483 68
Interest at the rate of ten per cent. per annum from day of sale to date of redemption	
Amount required to redeem	

Received payment.

——— ———, *Collector*,
By ——— ———.

T. D.

Auditor's Coupon.

1879.

DISTRICT OF COLUMBIA,
Nov., 1884.

Items of sale:

To all of tax	$409 47
To penalty	73 71
To advertising	40
To auctioneer's fee	10
	$483 68

1879. Tax book, folio 426, of lot- 2 & 3, square No. 405.

Amount sold for taxes Nov. 25, 1879, assessed in name of S. L. Crane	483 68
Int. at 10 pr. ct. pr. annum from date of sale to date of redemption	
Am't required to redeem	

81 1880.

DISTRICT OF COLUMBIA,
Nov., 1884.

Items of sale:

To all of tax for year ending June 30, 1880	$409 47
To penalty	57 33
To advertising, 1880	40
To auctioneer's fee	10
Amount sold for	$467 30

1880. Tax book, folio 457, of lot- 2 & 3, square No. 405.

To amount sold for taxes Oct. 1, 1880, assessed in name of Sarah L. Crane	$467 30
Interest at the rate of ten per cent. per annum from day of sale to date of redemption	
Amount required to redeem	$

Received payment.

——— ———, *Collector*,
By ——— ———.

T. D.

Auditor's Coupon.

1880.

DISTRICT OF COLUMBIA,
Nov., 1884.

Items of sale:

To all of tax	$409 47
To penalty	57 33
To advertising	40
To auction fee	10
	$467 30

1880. Tax book, folio 457, of lot- 2 & 3, square No. 405.

Am't sold for taxes Oct. 1, '80, assessed in name of S. L. Crane	$467 30
Int. at 10 pr. ct. pr. annum from date of sale to date of redemption	
Amount required to redeem	$

82 1881.

DISTRICT OF COLUMBIA,
Nov., 1884.

Items of sale:

To all of tax for year ending June 30, 1881	$409 47
To penalty	57 33
To advertising, 1881	40
To auctioneer's fee	10
Amount sold for	$467 30

1881. Tax book, folio 478, of lot- 2 & 3, square No. 405.

To amount sold for taxes Sept. 27, 1881, assessed in name of S. L. Crane	$467 30
Interest at the rate of ten per cent. per annum from day of sale to date of redemption	
Amount required to redeem	$

Received payment.

——— ———, *Collector*,
By ——— ———.

T. D.

Auditor's Coupon.

1881.

DISTRICT OF COLUMBIA,
Nov., 1884.

Items of sale:

To all of tax	$409 47
To penalty	57 33
To advertising, 1881	40
To auctioneer's fee	10
Amount sold for	$467 30

1881. Tax book, folio 478, of lot- 2 & 3, square No. 405.

Am't sold for taxes Sept. 27, '81, assessed in name of S. L. Crane	$467 30
Int. at 10 per ct. pr. annum from date of sale to date of redemption	
Amount required to redeem	$

83 SCHEDULE B.

Account of Rents Collected by the Complainant Subsequent to the Order of December 15th, 1881.

Collections:

1882. January.
February.
March.
April.
May.
June.
July.
August.
September.
October.
November.
December.

84 1882.

DISTRICT OF COLUMBIA.

Items of sale:

To all of tax for year ending June 30, 1882	$409 47
To penalty	57 33
To advertising, 1882	40
To auctioneer's fee	10
Amount sold for	$467 30

1882. Tax book, folio 491, of lot- 2 & 3, square No. 405.

To amount sold for taxes Sept. 26, 1882, assessed in name of Sarah L. Crane	$467 30
Interest at the rate of ten per cent. per annum from day of sale to date of redemption	
Amount required to redeem	$

Received payment.

——— ———, *Collector*,

By ——— ———.

T. D.

Auditor's Coupon.

1882.

DISTRICT OF COLUMBIA.

Items of sale:

To all of tax	$409 47
To penalty	57 33
To advertising	40
To auction fee	10
Amount sold for	$467 30

1882. Tax book, folio 491, of lot- 2 & 3, square No. 405.

Am't sold for taxes Sept. 26, '82, assessed in name of S. L. Crane	$467 30
Int. at 10 per ct. pr. annum from date of sale to date of redemption	
Amount required to redeem	$

85 1883.

DISTRICT OF COLUMBIA, *Nov.*, 1884.

Items of sale:

To all of tax for year ending June 30, 1883	$409 47
To penalty	57 33
To advertising, 1883	40
To auctioneer's fee	10
Amount sold for	$467 30

1883. Tax book, folio 18, of lot- 2 & 3, square No. 405.

To amount sold for taxes Sept. 25, 1883, assessed in name of Enoch Totten, tr.	$467 30
Interest at the rate of ten per cent. per annum from day of sale to date of redemption	
Amount required to redeem	$

Received payment.

——— ———, *Collector*,

By ——— ———.

T. D.

Auditor's Coupon.

1883.

DISTRICT OF COLUMBIA, *Nov.*, 1884.

Items of sale:

To all of tax	$409 47
To penalty	57 33
To advertising	40
To auction fee	10
Amount sold for	$467 30

1883. Tax book, folio 18, of lot- 2 & 3, square No. 405.

Am't sold for taxes Sept. 25, '83, assessed in name of Enoch Totten, tr.	467 30
Int. at 10 per ct. per annum from date of sale to date of redemption	
	$

86 1884.

DISTRICT OF COLUMBIA,
Nov., 1884.

Items of sale:

To all of tax for year ending June 30, 1884	$367 82
To penalty	51 40
To advertising and autioneer's fee	40
Amount sold for	$419 71

1884. Tax book, folio 18, of lot- 2 & 3, square No. 405.

To amount sold for taxes Sept. 23, 1884, assessed in name of E. Totten, tr.	$419 71
	$

Received payment.

—— ——, *Collector*,
By —— ——.

T. D.

Auditor's Coupon.

1884.

DISTRICT OF COLUMBIA,
Nov., 1884.

Items of sale:

To all of tax	$367 82
To penalty	51 40
To advertising & auct. fee	40
	$419 71

1884. Tax book, folio 18, of lot- 2 & 3, square No. 405.

To amount sold for taxes Sept. 23, '84, assessed in name of E. Totten, tr.	$419 71
Int. at 10 per ct. per annum from date of sale to date of redemption	
Amount required to redeem	$

87 *Exceptions in Behalf of Jane C. Hitz to the Report of the Auditor in the Above-entitled Cause. Filed on or about March 31st, 1885.*

In the Supreme Court of the District of Columbia.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ *et al.* } Equity No. 6583.

Filed Apr. 7, 1885. R. J. Meigs, clerk.

The said Jane C. Hitz excepts to the said auditor's report as follows:

1. The said auditor erroneously charges upon and against the fund in the registry of the court all the expenses of the said audit and the clerk's costs.

2. The said auditor erroneously charges upon and against the said fund in the registry of the court the taxes for the years 1882 and 1883, with interest.

3. The said auditor does not award and distribute to the said Jane C. Hitz the whole amount of the rents, issues, and profits collected by the said complainant, Benjamin U. Keyser, but erroneously leaves undistributed the amount collected by said Keyser prior as well as subsequent to the order of December 15th, 1881, to which amount said Jane C. Hitz is entitled, and which should have been awarded by the said report to her undiminished by any charges for taxes or otherwise.

ENOCH TOTTEN,
Counsel for Jane C. Hitz.

88 In the Supreme Court of the District of Columbia. In Equity.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ, WILLIAM P. JENKS, *et al.* } No. 6583. Doc. 19.

Filed Apr. 27, 1885. R. J. Meigs, clerk.

The defendant, William P. Jenks, excepts to the auditor's report filed in the above-entitled cause on the 31st of March, 1885—

1. For that the auditor has not charged the complainant with the rents collected prior to December 15th, 1881, the date of the decree in special term.

2. Because of the allowance to the complainant of ten per cent. commission upon the said rents.

3. Because the auditor has not applied the said rents or any of them, either to the debt of this exceptant or to taxes upon the property held as security.

4. Because the auditor has not applied the fund in court, or any part, to the debt of this exceptant.

5. Because the auditor has not applied the said fund to the payment of taxes upon the property held as security, except only such taxes as accrued after the decree in special term.

89 6. Because of the allowance to the complainant of a commission on account of the collection of the fund in court.

7. Because of the finding that after the payment out of the fund in court of the items mentioned in Schedule D the balance of $2,804.56 should be paid to Jane C. Hitz.

8. Because of other errors apparent on the face of the report.

W. D. DAVIDGE,
Sol'r for Exceptant.

In the Supreme Court of the District of Columbia.

B. U. KEYSER, Receiver,
vs.
JOHN HITZ *et al.* } No. 6583. Equity Doc. —.

Upon the application of auditor of the court it is this 4th day of May, 1885, ordered that the fee of the said auditor for stating the accounts and the cost of deposition taken in the reference be paid from the fund in the registry of the court.

Fee for account	25 00
Deposition	35 00

By the court:

D. K. CARTTER,
Ch'f Jus't.

We consent.

W. D. DAVIDGE,
Sol'r for W. P. Jenks.
ENOCH TOTTEN,
For Mrs. Hitz.

90 In the Supreme Court of the District of Columbia. In Equity.

BENJAMIN U. KEYSER, Receiver,
vs.
JOHN HITZ, JANE C. HITZ, *et al.* } No. 6583. Doc. 19.

Filed June 19, 1885. R. J. Meigs, clerk.

The complainant, Benjamin U. Keyser, receiver, &c., excepts to the auditor's report filed in the above-entitled cause on the 31st of March, 1885—

1st. For that the auditor has not applied the fund in court, or any part thereof, to the debt of complainant, ascertained by judgment, as stated in his petition heretofore filed in this cause.

2d. Because of the finding that after the payment out of the fund in court of the items mentioned in Schedule D the balance of $2,804.56 should be paid to Jane C. Hitz.

LEIGH ROBINSON,
Solicitor for Complainant & Exceptant.

91 *Decree.*

In the Supreme Court of the District of Columbia, the 13th day of July, 1885. In General Term.

B. U. KEYSER, Receiver, &c.,
vs.
JOHN HITZ *et al.* } 6583. Eq. Doc. 19.

This cause came on to be heard at this term upon the report of the auditor filed herein March 31, 1885, and the several exceptions thereto filed by the plaintiff Keyser, and the defendants Jenks and Mrs. Hitz, and was argued by counsel and considered by the court.

And the court being of the opinion that the money in the registry of the court received from the rents and profits of the property in question is applicable as well to the payment of the taxes and assessments that had accrued upon said property prior to the decree passed herein in special term, November 28, 1881, as to the payment of those that accrued thereafter—

It is, this 13th day of July, 1885, ordered, adjudged, and decreed
92 that the several exceptions of the defendant Jenks, numbered, respectively, three (3), four (4), five (5), and seven (7), and the exception of the plaintiff Keyser, numbered two (2), be, and the same are hereby, sustained, and that the several exceptions of the defendant Jenks, numbered, respectively, one (1), two (2,) six (6), and eight (8); and the exceptions of the defendant Mrs. Hitz, numbered, respectively, one (1), two (2), and three (3); and the exception of the plaintiff Keyser, numbered one (1), &c., be, and the same are hereby, overruled.

And it appearing to the court from said auditor's report and the exhibits thereto that the taxes and assessments that had accrued upon said property prior to January 1st, 1879, with interest thereon, will more than absorb the balance of said fund in the registry of the

court, after satisfying the costs as taxed by the auditor, amounting to $99.03, and the taxes and assessments, and interest thereon, amounting to $1,058.59, allowed by the auditor—

It is further ordered, adjudged, and decreed that the said money in the registry of the court, less the said costs, being $3,363.45, be paid by the clerk to Richard W. Tyler, receiver herein, to be by him receipted for, and forthwith paid and applied towards the satisfaction of all the taxes and assessments, and interest thereon, mentioned in Schedule "C" of said report of the auditor, for which application and payment he shall be allowed credit in his account as receiver.

93 And, further, that this cause be, and the same is hereby, referred to the auditor of this court to state the account of the said receiver.

And that the said report of the auditor filed March 31, 1885, save so far as the same is modified by this decree, be, and the same is hereby, confirmed.

By the court:

WM. M. MERRICK,
Justice S. C., D. C.

Memorandum.

And from this decree Jane C. Hitz appeals to the Supreme Court of the United States in open court.

Certified by—

A. B. HAGNER.

94 In the Supreme Court of the District of Columbia, the — day of ——, 188–.

BENJAMIN U. KEYSER, Receiver,

vs.

JANE C. HITZ, JOHN HITZ, WILLIAM P. JENKS, *et al.*

Filed Oct. 30, 1885. R. J. Meigs, clerk.

Know all men by these presents that we, Jane C. Hitz and Elias E. White, are bound unto the above-named William P. Jenks in the sum of one thousand dollars ($1,000), to be paid to the said William P. Jenks, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 29th day of October, 1885.

Whereas the above-named Jane C. Hitz has prosecuted [an appeal] to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia of July 13, 1885:

Now, therefore, the condition of this obligation is that if the above-named Jane C. Hitz shall prosecute her said appeal to effect and answer all costs if she shall fail to make good her plea, then this

obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JANE C. HITZ. [SEAL.]
ELIAS E. WHITE. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved this 30th day of October, 1885.

CHARLES P. JAMES, *J.*

95 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 3d day of November, 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 3d day of Nov., 1885.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 3d day of Nov'r, 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS,
Assistant Clerk.

Endorsed on cover: Dist. of Columbia supreme court. No. 788. Jane C. Hitz, appellant, *vs.* William P. Jenks. Filed November 5, 1885.

123-297

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

JANE C. HITZ, *Appellant*,
vs.
WILLIAM P. JENKS' *Executors*. } Nos. 28 and 468.

Brief for Appellant.

ENOCH TOTTEN,
For Appellant.

R. O. POLKINHORN, PRINTER.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

JANE C. HITZ, *Appellant*,

vs.

WILLIAM P. JENKS' *Executors*.

Nos. 28 and 468.

Brief for Appellant.

This controversy involves the valuable property on the northeast corner of 9th and G streets, in the city of Washington.

In January, 1879, the original complainant, Keyser, as receiver of the German-American National Bank, a corporation lately doing business in the city of Washington, exhibited his bill praying for an injunction for the cancellation of a certain deed of release, for the sale of certain real property and for the application of the proceeds to the payment of certain notes denominated the "Chipley notes," which were apparently, but not in fact, part of the assets of the insolvent bank of which he was receiver, and for other relief. All the defendants answered, and the defendant Jane C. Hitz filed a cross-bill, seeking relief in her own behalf as against a certain

deed of trust from Sarah L. Crane to the defendant Tyler, held for the security of the defendant Jenks the appellee, for $20,000, and as against a "deed" purporting to be from herself and husband to said Crane, and charging that the whole transaction, so far as it related to or involved her interest, was fraudulent. Mrs. Hitz, by leave of the court, subsequently filed an amendment to her cross-bill, charging that the deed purporting to have been made by her and her husband, conveying the property to Crane, was fraudulently altered in material parts by the vendee, or those claiming under the deed whilst in their possession and after it had been procured from her. The cause was then referred to an examiner, and additional testimony on this point was taken. After argument on the merits, the Special Term (Wylie, J.) passed a decree (87), annulling the deeds made to and by Miss Crane, so far as the interests of Mrs. Hitz were concerned, but sustaining it as to John Hitz; the "Chipley" notes were held to be paid, but the rents of the property of Mrs. Hitz were held for the payment of the Jenks' loan, on the theory that Hitz owned his marital interest in this estate of his wife as at common law, and that such interest passed by the deed to Miss Crane. From this decree the complainant and the defendants Jenks and Jane C. Hitz appealed to the General Term. The General Term reversed this decree, and made another dismissing the original bill of the complainant, and also the cross-bill of Mrs. Hitz. This latter decree in effect declares that the "Chipley" notes, upon which the complainant's case was based, had been paid, and, therefore, that the deed of release which was the object of attack by him, was properly

made. From this decree no appeal has been taken by the complainant, Keyser, and the time for such appeal having elapsed, the case, except as to an incidental question of rents, is narrowed down to the controversy between Mrs. Hitz and the appellee, who claims to be the owner of an incumbrance on the property by virtue of these Crane deeds, assailed as fraudulent by Mrs. Hitz.

From this decree of the General Term, Mrs. Hitz, and she alone, appealed.

The principal question now involved is whether the Crane deed, bearing date June 16th, 1877, purporting to be the deed of Jane C. Hitz and her husband to Sarah L. Crane, made to convey the property in dispute to the vendee in fee, is valid or fraudulent. It seems to have been acknowledged by Mrs. Hitz on the 18th day of June, 1877, and by her husband two days later. (See R., 147.) She attacks this deed on three grounds, to wit:

First. It was the result of a fraudulent combination of her husband and others to cheat her, of which defendant Jenks and the bank had notice, actual and constructive, and in which he, by his agent, cooperated.

Second. It was fraudulently altered or procured to be fraudulently altered in material parts after the same had been so procured to be signed, sealed, acknowledged, and delivered by Jane C. Hitz, for which the grantee and the defendants, John Hitz, the insolvent bank and Jenks are chargeable.

Third. It was wholly without consideration, so far as the rights of Mrs. Hitz are concerned.

The decree appealed from provides that the original of this deed with the original abstract of title shall be sent up with the transcript, which has been done, and the court is invited to inspect the documents themselves.

Statement of the Facts.

A slight examination of the deposition of Keyser (100), of Mrs. Hitz (397), of Prentiss (276 and 602), and of John Hitz (152), will leave but little, if any, doubt that John Hitz, the husband, and Prentiss, the cashier of the bank, agreed together that the property of Mrs. Hitz should be used, without her knowledge, to prevent disaster to themselves and their bank; and that Austin was, at least, a ready instrument in their hands to accomplish their designs in this direction.

Mrs. Hitz was the only child, and sole heir of Michael Shanks, deceased, from whom she inherited a large fortune, both in real and personal property, the particulars of which were disclosed to this court in *Hitz* vs. *Bank*, 111 U. S., 673, as well as in this case.

The German-American National Bank, above mentioned, was, on the 14th of May, 1877, created out of the German-American Savings Bank. John Hitz was the president, Charles E. Prentiss was cashier, and S. F. Austin was assistant cashier. Both Hitz and Prentiss are defendants, and testified in this case, as did Austin. John Hitz was the husband of Mrs. Hitz, the complainant in this cross-bill, and Austin was the notary who signed the certificates of acknowledgment to the deed complained of. Miss

Crane, the grantee in that deed, was the sister-in-law of Prentiss (125). This bank closed its doors October 30, 1878, having had a career of a little over seventeen months.

In June, 1877, in order to retire the two notes called the "Chipley" notes, held by this national bank, one of which was long over due, and the other about to mature, the scheme was conceived and adopted, by Hitz or Prentiss, or more probably by the two in conjunction, of procuring an absolute conveyance in fee, of this property, by Mr. Hitz, to the sister-in-law of Prentiss, and then to secure a loan from Jenks, through Tyler, his agent, nominally to Miss Crane, but for the purposes of the bank, or Hitz, or more probably of both. The consideration expressed in this deed is $40,000. That was about the value of the property at that date. It is much more valuable now. Mrs. Hitz was, in fact, totally ignorant of this deed until after the failure of the bank. She does not admit that she executed the deed, but is unwilling to deny the signature; she, however, most emphatically denies that she ever did, or ever would have knowingly executed such a deed for such a purpose (401, 418, 419, 420, 441); she swears that she never would have incumbered her own property, and never suspected that she was doing such a thing, and that if the deed had been explained to her, or she had understood the contents of it, she never would have signed it. It seems that Mr. Hitz bought and sold property on his own account (417), and that she frequently signed and acknowledged deeds at his request, and without examination or special inquiry (416, 417); between the 25th of September, 1865, and

the 20th of June, 1877, less than two years, she joined with him in thirteen deeds (435). She says, such a thing as her husband selling or mortgaging her property never occurred to her mind, and that she did not suppose he would attempt to do anything with her property without consulting her (441).

Austin, who was the assistant cashier and the Notary Public who signed the certificate of acknowledgment, who was called to sustain the deeds, testified that he did not explain to Mrs. Hitz the deeds either "fully" or otherwise, and himself neither read nor knew the contents of them. (135, 136, 139, 146, 150, 152, 656, 657.)

The appellee, Jenks, is chargeable with previous notice, both actual and constructive, of the fraudulent character of the Crane transaction. To fully understand his knowledge of, if not his participation in, the whole fraud, it is necessary to refer to the pretended loan called the "Chipley" notes, which was the first consummated effort of John Hitz to fraudulently dispose of any of his wife's inherited real property. The first known attempt made by John Hitz to so dispose of his wife's real estate for his own purposes, was in 1875 during the absence of Mrs. Hitz in Europe. He personally made a conveyance of her property on Penn. Avenue, known as the "New York House" or "New York Restaurant" to Mrs. Hatch, as a mere matter of concealment, and Mrs. Hatch re-conveyed it to secure a nominal loan to her of $15,000.00. This court had occasion to comment upon this particular transaction in *Hitz* vs. *The Bank*, (111 U. S., 672). The second effort was

the trust deed to Donaldson and Prentiss, procured from her to secure these fraudulent notes called the "Chipley" notes. This Chipley business was a plain fraud. Mrs. Hitz, it seems, was induced, by some means unknown to her and undeveloped by the evidence, to sign and acknowledge a deed of trust on the property in question, to Donaldson and Prentiss, to secure these two notes. Mrs. Hitz received no consideration for the same, and she most positively denies that she ever knew anything about this trust deed until after the failure of the bank. On the 14th of May, 1877, as before stated, the German-American Savings Bank was converted into the German-American National Bank. The first of the "Chipley" notes had on the preceding 5th of January matured, and was held as "overdue paper," and of course had become a subject-matter of report to the Comptroller of the Currency, and a subject-matter of comment under his supervising power; the second note had but little more than six months to run and then $10,000 more would be added to overdue paper, in the same name, *i. e.*, the name of William R. Chipley. The first visit of a bank examiner would be likely to disclose the true standing of the maker and endorser of this paper, who, all parties concede, were men of straw; the explanation that the debt was really that of the president of the bank would make a bad business worse. In addition to the very unsavory condition of this loan, the bank was embarrassed by a lack of money, and to get $20,000, instead of these scandalous notes, would be a financial achievement much to be desired. The laws and regulations governing the business of national banks, required that a sum of money equal

to twenty-five per centum of the aggregate amount of its notes in circulation and of its deposits, should be kept on hand; a failure to provide this "lawful money reserve," on notice to that effect from the Comptroller, might have resulted in the appointment of a receiver to wind up the business of the institution. (R. S., 5,191.) This reserve fund of the bank, in June 1877, was deficient, and had been for some time; the officers had been borrowing money on their individual notes of hand for some time (276, 277, 278, 279, and 280). It is not overstating the case to say that the bank at this time was in embarrassed circumstances.

In this unsatisfactory condition of affairs it was necessary to find some source of relief, and Mrs. Hitz was again selected as the victim. With the aid of his cashier, Hitz undertook to carry out another scheme, which, in all its details, was, if that was possible, a greater fraud than the scheme of the "Chipley" notes. It was as follows: On the 16th day of June, 1877, Donaldson and Prentiss executed, acknowledged and delivered a deed of release of the Donaldson trust—the deed bears date on that day and releases the property *to Mrs. Hitz*, but she never saw or heard of the release until after the bank failed. It was filed for record by Prentiss or the defendant Tyler the agent of Jenks, on the 20th day of June, 1877 (11). On the 16th day of June, 1877, a deed was prepared, under the direction of Prentiss, by one of the clerks in the bank, dated on that day, in which Jane C. Hitz was the sole grantor and one Sarah L. Crane, the sister of the wife of Prentiss, was selected as the grantee; the deed was drawn to convey this property to Crane in fee for the expressed consideration of $40,000.

Prior to the preparation of this deed negotiations had begun and had proceeded to an agreement for a loan between the defendant Jenks and John Hitz and Prentiss. Jenks was a banker and a man of wealth, residing in Philadelphia, and was represented here by his agent, the defendant Tyler (239). Tyler sometime prior to the date mentioned had applied to Hitz for advice on the propriety and safety of a proposed loan, which Hitz promptly condemned, for the alleged reason that the real estate offered for security was located in a "boarding-house" locality (193). At the time of expressing this opinion he told Tyler that in a few days *he himself* would be prepared to submit a proposition for a loan of $20,000, which would be found advantageous and unobjectionable (194). Subsequently he informed Tyler that his bank held a loan of $20,000 which was secured by a deed of trust on this property, and that he desired to borrow said sum of $20,000 and secure the payment of the same on this property. The abstract disclosed the existence of the Donaldson trust, which was made to secure these "Chipley" notes, and Tyler personally knew that the "Chipley" notes were in the bank, and were to be paid with his money (202, 206, 208). Hitz at the time informed Tyler that the bank "had difficulty in keeping up" its reserve, and that it was in need of money in order to carry on its discounting business, and hence desired to convert the securities which it held to meet "the necessities" of the bank (194). Hitz also disclosed to Tyler that he deemed it dangerous to borrow and secure the money in his own name, because the public record of the deed would betray the fact that *he* was a borrower of

money, and that he being president of this bank and also of an insurance company the credit of those institutions might be thereby injured. For these reasons he proposed to Tyler to have the property transferred to some third person and by such means consummate the transaction without endangering his own credit or that of his bank (201, 205, 209, 246, 256). Tyler, on the 13th day of June, 1877, wrote and sent to his principal a letter touching the prospect of investing $20,000 at eight per centum per annum, and in this letter ventures the prophecy to his principal that "the security and the *moral risk* will *both* suit you."—(See letter annexed to Tyler's deposition, p. 257.) Tyler thereupon employed the firm of Ashford & Hopkins to examine and report upon the record title to the property offered as security for the proposed loan. On such examination it appeared that the title was in Michael Shanks at the time of his death, and that Jane C. Hitz had inherited from him, subject to the dower estate of the widow (an aged lady), and subject also to the Donaldson deed of trust, made to secure the payment of the "Chipley" notes. Tyler personally inspected the property, and knew that Mrs. Hitz was in possession and getting the rents (255, 248). He took the abstract of title, made by Hopkins, to Philadelphia and exhibited it to his principal. He had been informed of the plan devised by Hitz and his confederates to procure an absolute deed from Mrs. Hitz conveying the fee to Miss Crane, and that the latter was to make the note for $20,000 and execute a trust deed on the property to secure its payment; and that this Miss Crane was the sister-in-law of Prentiss (207, 247); he says he was told by Prentiss that Miss Crane was worth only

$8,000 or $10,000 (247). But Prentiss declares he never told him so, and that this estimate of her wealth was not true (312). He was also advised by Hitz that for the balance of the value of the property (it being worth $40,000) he intended to take from Miss Crane a second trust deed on the property (210). Tyler consulted his counsel on the subject, and concluded that no valid objection could be taken to the character of the proposed Crane transaction (201).

Tyler testifies that he supposed the "Chipley" notes were the debt of Mrs. Hitz (245). Hitz says they represented several debts of his to the bank (160, 165), but Prentiss tells us that John Hitz was not, at that time, personally indebted to the bank (278, 281), or very little at most. The truth probably is that the "Chipley" notes were made to cover the personal debts, and wild endorsements of Hitz; the Crane transaction was made to cover the Chipley transaction and deceive the National Bank examiners.

On the 15th day of June, 1877, Tyler wrote to Jenks explaining the character and form of the proposed security, and enclosed an application for the loan to Sarah L. Crane (255). He therein states that Miss Crane was to make the note and that Hitz, president of the bank, was to endorse it and waive demand notice and protest, and assume the payment of the interest. Tyler knew Mrs Hitz *owned* the property, and he substantially admits that he knew Miss Crane was to pay nothing for it—that she was a woman of "straw" (208, 245, 246, 247). He says in one place that "*Mr. Hitz proposed to have the title vested in a third party, and when it came*

to vesting it in a third party Miss Crane was taken," and in another that "Mr. Hitz stated, *as a reason for that* (*i. e.* the conveyance to Crane), that he didn't want to appear — on account of his connection with the bank and the insurance company—*as a borrower of money at that time*" (274). Her brother-in-law, Prentiss, was willing to estimate her fortune (to Tyler, who seems to have been curious on that subject) at not more than a few thousand dollars at the time she was to purchase property worth $40,000.00 (247) from Mrs. Hitz.

On the 18th of June, 1887, Mrs. Hitz apparently signed and acknowledged the deed to Crane, if she ever did it. On the 16th the release of the Donaldson trust had been completed, and this release and the deed in fee to Crane were both sent, on the 18th, by Prentiss, and very probably by the hands of Tyler, to the office of Ashford & Hopkins and delivered to Hopkins. The abstract disclosed the unsatisfied dower interest of the widow; about this dower interest Tyler seems to have entertained doubts, and, therefore, on the evening of the 18th, as before stated, he started to Philadelphia, and on the 19th had a consultation over the abstract with his principal, Mr. Jenks. On the morning of the 20th Tyler arrived in Washington. It is more than probable that the first place of business visited by him was the office of Hopkins, and that Hopkins then handed to him the deed of Mrs. Hitz, with the objection thereto noted upon the back of it, in these words and in his (Hopkin's) handwriting, to wit: "Ashford & Hopkins think it advisable that Mr. Hitz should be made a party to this *deed*, inasmuch as Mrs. Hitz acquired title before the date of the married woman's act." (See

original deed). This *deed* was then probably sent back to Prentiss in order that it might be made to conform to the opinion of the attorneys. When Prentiss ascertained what was the infirmity of the "deed," he sent for Dorian, the clerk who had prepared the deed in the first instance, and directed him to make the necessary alterations. Dorian did so by interlineations and erasures, and the result was a deed of the most extraordinary and suspicious appearance. The words "and John Hitz, her husband," were added by being crowded into much too short a space, and the singular verbs were scratched out and their plurals written over the broken surface of the paper. One of these words, over which the impression of the seal had been made was clumsily erased with some sharp instrument, *which carried away a part of the impression of the Notary's seal.* This is plain to the naked eye, but with an ordinary magnifying glass it is unmistakable, (see the original deed.) The blank for the certificate of acknowledgment of the husband was torn from another blank form, and was pasted between the leaves of this deed, and in anything but an artistic manner. An inspection of the deed will show that there were on the blank, two printed scrolls made to represent seals with the abbreviation "L. S." within each of them. At the time Dorian filled up the deed for Mrs. Hitz he wrote over each of these (584) printed representations of "seal," in a sprawling hand, the word "seal;" Prentiss, however, supposing that Mrs. H., and she only, was to sign the deed, erased or caused to be erased the second seal by drawing through it nine lines or strokes of a pen loaded with black ink; (606.) But when Mrs. H. signed the deed (if she ever did) she

signed it opposite this erased or blotted seal. When the deed again reached the hands of Prentiss he probably noticed this misfortune and undertook to correct it, by making *for her* a scroll between her signature and the blotted seal, and at the same time drew the two heavy ink lines through the vacant place for the first signature and immediately over the signature of Mrs. Hitz and also through the unblotted seal previously manufactured by Mr. Dorian (see 523, 524), and he then had the seal for Hitz, made by Dorian (606, 545, 524.) All this revision must have been done on the 20th of June, two days after Mrs. Hitz had parted with the "deed." This seems, after a careful scrutiny of the lacerated deed and the various stories of Dorian and Prentiss about the deed, as the only reasonable theory of the alteration of the deed.—(See depositions of Dorian, Prentiss, and Tyler). This so-called "deed" is next found at the record office in the hands of Tyler, Ashford and Hopkins, undergoing inspection together with the Donaldson release and the Crane trust, (326, 367, 368,) and were then, on the 20th, delivered for record at the same time, at 2.20 P. M.,

The original of the "abstract of title" is also useful in elucidating this problem; the original of this paper has also been sent here for inspection. It contained a memorandum of this "deed," describing it as a *deed* from "Jane C. Hitz to Sarah L. Crane." The abstract bore the signature of Hopkins alone, clearly indicating that this deed was noted thereon by Hopkins before the suggestion was made to him that the husband should join. Afterwards the preposition "to" was erased and the two words "*et vir*" were interlined, all of which now plainly appears. Hop-

kins evidently supposed that he alone was to sign the abstract, and had written immediately under his name and on the next line the date, "June 20, 1877." Tyler probably insisted upon it that Ashford should also sign the paper, and Ashford thereupon wrote his name in the narrow space between the signature of Hopkins and the date before mentioned. This is plain to be seen on the paper now. The proof shows that Hopkins had exclusive charge of the business. (265.) Mr. Ashford probably never saw this deed, and signed the abstract only because Tyler insisted upon it. The concluding part of the abstract when it was taken to Philadelphia was the certificate, and it began with the words "I have examined the title," &c. The pronoun "I" was subsequently erased and Ashford wrote in its place the pronoun "we."

After Ashford & Hopkins had pronounced the title clear and the deeds correct Tyler carried the check for $20,000, drawn by Jenks to the order of Tyler and by him endorsed in blank, to the bank, and there delivered it to Prentiss, who endorsed it as cashier of the bank and caused it to be collected.

A series of flirtations with the Chipley notes then began on the books of the bank, which would probably excite the amazement of book-keepers and financiers, but they are not regarded as important as the case now stands.

DATES OF DEEDS INVOLVED.

January 26, 1876.—Trust deed from Hitz and wife to Prentiss and Donaldson to secure two notes of Chipley, $10,000 each, dated January 5, 1876. Deed

acknowledged January 26 and recorded January 27, 1876.

June 16, 1877.—Deed of release of above trust by Prentiss and Donaldson. Acknowledged June 16th, and recorded June 20, 1877, and No. 21.

June 16, 1877.—Deed from Hitz and wife to Crane. Acknowledged by Mrs. Hitz, June 18, and by her husband signed and acknowledged on the 20th of June.

June 18, 1877.—Deed of trust from Sarah L. Crane to Tyler to secure Jenks $20,000. Acknowledged June 20, and recorded same day at 2.20 P. M. No. 23.

The following statement and dates will be useful in the consideration of this cause:

August 5, 1856.—John Hitz and Jane C. Shanks were married.

May 20, 1864.—Michael Shanks (father of Jane C. Hitz) died intestate.

April 10, 1869.—The "married woman's act" became a law.

January, 1872.—German-American Savings Bank organized.

May 14, 1877.—Savings Bank converted into German-American National Bank.

October 30, 1878.—German-American National Bank closed its doors and Keyser, receiver, took possession November 1, 1878.

Assignment of Errors.

The Supreme Court of the District of Columbia erred for the reasons following:

1. By decreeing the validity of the deed bearing date

June 16, 1877, and recorded on the 20th of June, 1877, from Jane C. Hitz and husband to Sarah L. Crane ;

2. By decreeing the validity of the trust deed from Sarah L. Crane to R. W. Tyler, bearing date June 18, 1877, and recorded June 20, 1877 ;

3. By refusing to award to Mrs. Hitz the money collected from her property by Keyser.

Points and Authorities.

The so-called deed, bearing date June, 16, 1877, purporting to have been made by Jane C. Hitz and John Hitz, her husband, to Sarah L. Crane, is fraudulent and void as to all persons.

1. It was procured by means of fraud and deception, and the defendant Jenks was constructively a party to such fraud ;

2. It was not properly acknowledged ;

3. It was without consideration ;

4. It was fraudulently altered as to material parts by the grantee or those claiming under the deed, after execution and delivery, and whilst in the possession of such grantee or persons claiming under the deed ;

5. The deed is inoperative, by virtue of the prohibitions of the "married woman's act," so far as the marital interest of the husband in the property are concerned.

1. *The deed was procured from Mrs. Hitz by fraud and deceit, and the appellee was constructively a party thereto and is chargeable therewith.*

The agent of Jenks knew he was dealing with the separate estate of a married woman, of which she was in possession, collecting the rents; he knew that there was upon record, and to be discharged, a trust deed apparently made to secure the debt, not of the married woman or of her husband, but of a stranger, and he was informed that this debt was owned by the bank; he knew the debt was not yet due; he knew that a fraudulent deed in fee was to be made to a stranger as a mere cloak to cover up the fact that the bank and Hitz were in embarrassed circumstances, and were borrowing money; he knew that the bank officers were troubled by the requirements of the national banking law, which compelled it to keep on hand a specific "reserve" fund; he knew, or was bound to know, that the Crane transaction was designed to deceive the public and the bank-examiner as to the true condition of the bank; he knew that no consideration was to be paid by anybody for the property to be transferred by the married woman to Miss Crane; he knew the deed showed that Mrs. Hitz had signed and acknowledged two days before her husband did, and that the deed itself had been grossly mutilated in order to make the husband a party to it. With all these suspicious circumstances before him, instead of seeking information from Mrs. Hitz, he became an active agent in consummating the fraud.

Here was enough to put a prudent man upon his inquiry, and he is bound by every fact that would have come to light had he been diligent. If he had sought Mrs. Hitz, the person above all others, he should have seen first about any transaction relating to her property, he would have learned instantly that

the "Chipley" notes and the Donaldson trust were a mere fraud, and that the proposed transfer to Crane was a fraud upon her rights without a single redeeming virtue. But Tyler frankly testifies (272) that he never considered the interests of Mrs. Hitz in the matter, and he is certainly correct in this!

Open and notorious occupation and adverse holding by the first purchaser, when the second deed is taken, is in itself sufficient to warrant a jury or court in finding that a purchaser had evidence before him of a character to put him on inquiry as to what title the possession was held under. (*Lander* vs. *Brant*, 10 How., 348.) Whenever a purchaser has notice that the estate is affected by other interests than those of the vendor of the legal title (Crane in this case), he is bound to inquire into the extent and terms of those interests. (Gibson, C. J.; *Sergeant* vs. *Ingersoll*, 15 Pa. St., 348; 48 N. Y., 326. It is sufficient to put a purchaser on inquiry, that he was informed the estate was not in actual possession of the person with whom he contracted; that he could not transfer the ownership and the possession together; and that these were interests into the extent and terms of which he ought to inquire. (*Taylor* vs. *Stibbert*, 2 Vesey, Jr., 440; 13 Vesey, 114; 4 Mass., 639; *Cordova* vs. *Hood*, 17 Wall., 1; *Shaw* vs. *Spear*, 100 Mass., 382; *Bloisdell* vs. *Stevens*, 15 Vt., 179; Wade on Notice, 1.)

Tyler well knew that Mrs. Hitz was to receive no consideration. When no consideration passes, notice is not necessary, and especially if the grantee had such notice as should put him upon his inquiry; for instance, where the wife's separate property is

mortgaged to pay the antecedent debts of her husband. (*Wiley* vs. *Prince*, 21 Texas, 640; 2 Kent, 167.)

2. *In support of the second objection it is necessary only to compare the evidence showing the action of the notary in reference to this deed with the requirements of the statute on the subject.*

The following are the provisions of our statute relating to the acknowledgment of deeds by married women:

"When any married woman shall be a party executing a deed for the conveyance of real estate or interest therein, and shall only be relinquishing her right of dower, or when she shall be a party with her husband to any deed, it shall be the duty of the officer authorized to take acknowledgments before whom she may appear, to examine her privily and apart from her husband, and to explain to her the deed fully." (R. S. D. C., § 450.)

"If, upon such privy examination and *explanation, she shall acknowledge the deed to be her act and deed*, and shall declare that she had willingly signed, sealed and delivered the same, and that she wished not to retract it, the officer shall certify such examination, acknowledgment and declaration by a certificate annexed to the deed, and under his hand and seal, to the following effect:"

"——— county, [or city, &c.,] to-wit:

"I, A. B., a justice of the peace, [or other prescribed officer, giving title,] in the county [or city, &c.] aforesaid, in the State [or Territory, &c.] of ———, do hereby certify that C. D,, the wife of E. F., party to a certain deed bearing date on the —— day of ——— and hereunto annexed, personally appeared before me, in the county [or city, &c.] aforesaid, the said C. D., being well known to me as [or proved by the oaths of credible witnesses before me

to be] the person who executed the said deed, and being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said E. F., acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it. Given under my hand and seal this —— day of ———.

(§ 451.) A. B. [SEAL.]

"When the privy examination, acknowledgment, and declaration of a married woman is taken and certified and delivered to the recorder of deeds for record, in accordance with the provisions of this chapter, the deed shall be as effectual in law as if she had been an unmarried woman, but no covenant contained in the deed shall in any manner operate upon her or her heirs, further than to convey effectually her right of dower of other interest in the real estate which she may have at the date of the deed." (§ 452.)

The deed of a *feme covert*, conveying her interest in land which she owns in fee, does not pass her interest by the force of its execution and delivery as in the common case of a person under no legal incapacity. Ordinarily an acknowledgment gives no additional effect between the parties to the deed. It operates only as to third persons under the provisions of recording and kindred laws. The law presumes a *feme covert* to act under the coercion of her husband, unless by a separate acknowledgment out of the presence of her husband, before some court or judicial officer authorized to take and certify such acknowledgment.—(*Hepburn* vs. *Dubois*, 12 Peters, 375.)

"It is well contended that at common law a married woman could convey no interest in lands. She can convey now only by statute, and in such conveyance she must conform to the statutory requirements." *Woods* vs. *Polhemus*, 8 Ind., 60.

"Her acts are not like those of infants and some other disabled persons, voidable only; but are, in general, absolutely void." *Elliot* vs. *Piersol*, 1 Peters, 338.

In a case which went up from this District, this Supreme Court said:

"The separate examination and attendant solemnities required by law are indispensable, and must not be omitted." *Rhea* vs. *Rhenaer*, 1 Peters, 105. See *Johnson* vs. *Wallace* (53 Miss. 335), where this question is much discussed.

It is not pretended that the officer explained, or attempted to explain, the deed to Mrs. Hitz. He was called as a witness to sustain the correctness of his certificate, but could only say that he did not explain the deed to her; in fact he did not read it, and did *not himself know anything about the contents*. The utmost that he claims to have done was to ask her if she knew what the contents of the paper was. This, he says, was his custom; he never read the deeds and never undertook to explain them (137 to 151 and 656–7.) The statute says it is the "duty" of the officer to examine the married woman "privily and apart from her husband, and *to explain to her the deed fully*," and, if upon such examination and *explanation* she shall acknowledge the deed, then he shall make the prescribed certificate and annex it to the deed. When all these things shall have been done, and the deed delivered to the recorder of deeds,

then, but not till then, "the deed shall be as effectual in law as if she had been an unmarried woman." The question is presented here distinctly whether or not an acknowledgement without the required *explanation* is sufficient; if it is, then it should seem that the private "examination" and the acknowledgment may be also lawfully dispensed with. This cause forcibly illustrates the importance of this "explanation" as part of the privy examination. If this officer had told Mrs. Hitz that she was about to convey to Miss Crane, (a comparative stranger), a part of her inheritance, worth $40,000.00, for no consideration whatsoever, there can be no doubt as to the course she would have pursued. Mrs. Hitz testifies most emphatically that she never would have done such a thing.

This certificate is not conclusive upon Mrs. Hitz. (*Drury* vs. *Foster*, 2 Wall., 28; *Copeland* vs. *Bank*, 18 Md., 305; *Dewey* vs. *Campau*, 4 Mich., 565; *Fisher* vs. *Meister*, 24 Mich., 447.

In the case of *Dewey* vs. *Campau*, above cited, the notary undertook to take the acknowledgment of the deed of a squaw, the wife of the grantor, through the help of an interpreter, and in his certificate of acknowledgment he said that she had "stated," &c., &c., instead of that she "acknowledged," &c., &c. The court held that for this reason the deed was a nullity as to the married woman. (See *O'Farrell* vs. *Simplet*, 4 Iowa., 162 and *Dodge* vs. *Hollingshead*, 6 Minn., 1.) If this certificate had shown that Mrs. Hitz, on being asked by the officer if she knew the contents of the deed, stated that she did, it would have given the fact as to this point. Austin, the Notary says, (137) when asked if he informed

Mrs. Hitz of the contents of the paper, "I guess not; it is not my custom to do so." And again, (137) "I cannot identify anyone of these deeds, because *I never look* at a deed *in taking an acknowledgment.*" See his deposition, (137, 138, 139, 142, 146, 151, 656, 657.) Such evidence is competent to show that he did not explain the deed. (*Follett* vs. *Rose*, 3 McLean, 332.) The witness, Austin, the officer who took the acknowledgment of Mrs. Hitz was not called by those assailing the deeds involved, but he was called in support of his official action, and in his testimony related how he always took acknowledgments of deeds. And he probably thought, as he says he did (139), that all his duty required him to do in such cases, was to ask the woman if she was acquainted with the contents of the deed, and if she answered in the affirmative that then he might properly make the certificate. This was probably his view of the matter, his idea of an "explanation" of a deed. It seems most remarkable that in relation to a transfer of title to property of the magnitude of this estate there should be any doubt that the actual owner willingly and knowingly transferred it. If the owner had been a *man* instead of a *wife* there would have been no doubt!

Where the wife becomes the surety to pay the husband's debts antecedently contracted, it has been asserted that the ordinary rule as to the conclusiveness of the certificate of the notary, should not apply. Under such circumstances, says the Supreme Court of Texas, the "defenceless situation of the wife, the character and purpose of the obligations, &c., the rule should be that the creditor takes the

security at the risk of its nullity from the malign influences under which it was created; that for his own safety he must inquire into the circumstances surrounding the transaction, and before he touches the instrument see that it was not engendered in fraud and iniquity." (*Wiley* vs. *Prince*, 21 Texas, 640; 2 Story's Eq., § 1395.)

3. *The deed to Miss Crane was wholly without consideration.*

It is not pretended by anybody that Miss Crane ever paid or expected to pay a cent for the property. (124, 125.) She really knew but little about the matter; and nobody will say that Mrs. Hitz ever received the value of a cent for it. Prentiss says the conveyance to Miss Crane was a matter of "convenience;" that she was a mere "vehicle of title." (311.) The husband pretends that *he*, in consideration of the property, worth $40,000.00, caused to be transferred to his wife on the books of the bank $20,000.00 of its worthless stock. (172.) That he did do this, the records of this court show in an action at law against her by the receiver, on her personal liability as a stockholder. But this stock was transferred on the books to her on the 6th of April, 1876, (172,) more than a year before the date of the Crane deed, and Hitz at first said (159) that the stock was transferred as a consideration for the Donaldson trust, which bears date on the 26th of January, 1876, (154.) He declares at one time that he said nothing to her about this transfer of stock (161), and again he says he did tell her of it, (173.) He

kept the certificates of the stock (173) himself, and got her to sign the checks for dividends, and drew the money on them and kept it. (173.)

4. *The Crane deed was fraudulently altered as to material parts by the grantee or those claiming under the deed, after execution and delivery, and while in their possession, and Jenks is chargeable with notice both actual and constructive.*

A very slight examination of the original Crane deed ("Exhibit 5"), together with the original abstract of title, will leave no doubt that Mrs. Hitz did, whatever she did with the deed, on the 18th, and that it was then taken and delivered to Hopkins with the Donaldson release. On the same day the trust deed from Miss Crane to Tyler was prepared in Hopkins' office, and was by her signed and acknowledged (on the 18th) before Austin, (assistant cashier and) notary public. It seems to my mind clear that the alterations and mutilations of this "deed" were made after Mrs. Hitz had parted with it. The two men who ought to know about this are Dorian, the clerk who wrote and altered the deed, and Prentiss, the cashier, who gave the directions to that end. Dorian, when first interrogated on the subject, was very clear and emphatic that these mutilations were made *after* Mrs. H. had parted with the deed, and he made a clear emphatic statement, under oath and in writing, to that effect. On this oath, with others, leave was granted to amend the cross-bill, so as to let this question be investigated (90, 533). But soon after he made this affidavit, the agent of Jenks called upon him (Dorian) and asked

him if he had not "made a mistake" in making this affidavit, and thereupon, at the suggestion of this agent, (526, 547) he promptly made another affidavit directly contradictory of the first. Prior to the filing of the amendment to the crose-bill, Dorian was examined as a witness, and declared he *did not remember anything* about the circumstances of the preparation of this deed; all that he could say was that the deed was in his handwriting (236, 237). Before it had been charged that this deed had been fraudulently altered, Prentiss also testified that he remembered nothing about it (285). But afterwards, when the question became important, each of them undertook to give the details. Dorian admits that he wrote the word "seal" over the print "L. S." in the blank for the two signatures; he says he don't know who scratched or erased the second seal made by him; this was done, he says, after the deed left his hands (548); but he says that Prentiss drew the two heavy lines through the first seal, and through the place for the first signature, and this, too, *before* Mrs. Hitz had signed the deed (523, 524, 527, 542, 544, 548). But Prentiss distinctly asserts that he drew these two heavy lines *after* Mrs. H. signed and acknowledged the deed. He also says that either he scratched and erased the second seal made by Dorian, or directed Dorian, or some one else, to do so (606). Prentiss furthermore says that he made the small seal after the name of Mrs. Hitz (602, 604), but Mr. Edwards, a member of the bar, well acquainted with the handwriting of John Hitz, says this small seal is in the handwriting of John Hitz (553), and made with the same ink as the signature of John Hitz.

Several witnesses were called as experts who ex-

amined these documents with magnifying glasses, whose opinions thereon have been preserved in the record. See depositions of Neale (549,) Edwards (553, 578), Payne (575), Jones (570, 534), and others.

The alterations of the *deed are material.*

This court has decided that the marital rights of the husband in this real property, according to the commonlaw were fixed and vested before the "married woman's act," became a law in this District, (*Hitz* vs. *Bank*) (111 U. S., 673.) Therefore the deed of Mrs. H., alone to Crane, would have been of but little value during the husband's life. This court has also held in the case of *Mersman* vs. *Meyers* (112 U. S., 139) that any change of a written contract which alters the liability of a party by either increasing or diminishing it, is material.

As to alteration of deed, see, generally, *O'Neal* vs. *Long*, 4 Cr., 60; *Speake* vs. *U. S.*, 9 Cr., 28; *Moon* vs. *Birkhan*, 4. Binney, 1; *Coit* vs. *Starkweather*, 8 Conn., 289; *Adams* vs. *Frye*, 3 Met., 103; *Jackson* vs. *Malin*, 15 John., 293; *Hibblewhite* vs. *McMullin*, 6 M. & N., 200; *Walker* vs. *Caulk*, 9 Har. & J., 36; *U. S.* vs. *Nelson*, 2 Brock, 64; *Drury* vs. *Foster*, 2 Wall., 24. In the case of *Vanhorn* vs. *Dorrance* (2 Dall., 504) the court said: "There are several ways by which a deed may be voided or rendered of no effect. One of these is by razure, addition, interlining, or other alteration, in any material part, if done after execution." In *Moon* vs. *Berkham* (4 Binney, 1) the court said:

"When a deed has been acknowledged before a magistrate appointed by law to take and certify the acknowledgment, in order that the deed may be recorded, the parties have no right to make the most trifling alteration. The altered deed is not the same which is certified. The act of the magistrate is independent of the parties, and no consent of theirs can warrant them in falsifying it."

The presumption in this case is that the deed was altered by the vendor or those claiming under it for a fraudulent purpose and after execution and delivery.

Mrs. Hitz, in her answer to the original bill, avers that she had made diligent efforts to ascertain where this Crane deed was, but was unable to do so (44), and she also testifies to having made efforts to find it but without success (574, 575). Mr. Mussey, the attorney for Prentiss and Miss Crane, testified that frequent applications and inquiries were made to and of him by the counsel of Mrs. Hitz, who was in search of the deed, but to no purpose, (381–2). It seems, however, that the deed, after being recorded, was delivered by the recorder of deeds to Mr. Mussey, and a note to that effect was made upon the record. Mr. Mussey subsequently, about the time of the filing of the original bill, handed the deed to Tyler, and at the time of handing it to him, Mussey, pointed out to Tyler the suggestive and suspicious pencil directions endorsed on the "deed" by Hopkins (382, 592, 593). Tyler carefully considered the peculiarities of the deed, but maintained possession of it in *profound silence*, notwithstanding the efforts and inquiries of Mrs. Hitz and her counsel to ascertain the whereabouts of the deed and to get sight of it. The deed

was not permitted to see the light until Austin was sworn and was under examination, and an effort had been made to prove the deed by means of a copy; then, upon vigorous objection to the use of a copy and loud calls and demands for the original by counsel for Mrs. Hitz, the mutilated deed was brought forth and offered in evidence by the counsel for Jenks (134, 145). Here was a manifest and most suspicious attempt by those in possession and claiming under it to suppress and conceal this deed. This is a strong presumption against them. (*Wharton on Evidence*, 1,264, 1,266.)

The circumstances all operate against the validity of the Crane deed. It was confessedly altered to effect the joining of the husband as a party to the instrument, and the natural presumption is that the alteration was made at the time he became a party thereto. This was on the 20th of June; Mrs. Hitz parted with the deed on the 18th. The notary who took the acknowledgment of Mrs. Hitz, made no note of the changes and alterations in the deed, at the foot thereof, as is usual in cases of interlineations or alterations. Some of the alterations were made with different ink from the main part of the deed, and some with the same ink, and they were made by different hands. The appearance of the deed is most discreditable. The alterations were made in the interest of those to be benefited by it; they were advised that without joining the husband the deed would be of at least doubtful validity. It was produced and is relied upon by the appellee. Those representing him and interested with him, tried to suppress and conceal the mutilated instrument.

Either by Tyler's request, or with his consent, this

mutilated deed was prepared at the bank (583), and therefore the acts of Prentiss and Dorian in treating the instrument were constructively the acts of the appellee. The execution of the deed was procured by Prentiss and the husband, acting in the interest of the lender, and his acceptance of the results of the transaction implies the adoption of their agency. (See *Bank* vs. *Copeland*, 18 Md., 320.)

The appearance of this deed is so very discreditable and suspicious and the undisputed facts point so strongly to the conclusion that it was altered by those claiming under it, after it left the hands of Mrs. Hitz, that the burden of proof rests upon the party who produced and relies upon it, to establish by strong and satisfactory evidence that the mutilations were made before execution and for an innocent purpose. This court has established the doctrine on this subject, much stronger than is needful to fix the burden of proof here. It has stated the rule thus:

"But, it is said, the law imposes upon the party who claims under the instrument the burden of explaining the alteration. This is the rule, undoubtedly, *where the alteration appears on the face of the instrument, as an erasure, interlineation, and the like.* In such case, the party having possession of the instrument and claiming under it, ought to be called upon to explain it. It is presumed to have been done while in his possession." (*U. S.* vs. *Linn*, 1 How., 104.)

The same rule is declared in *Clifford* vs. *Parker*, 2 Man. & G., 909. 3d Washb. on Real Prop'y, 221, where this subject is discussed and authorities examined; 1 Greenl. on Ev., 564, and notes.

It is submitted that no satisfactory explanation has been made. Prentiss and Dorian both testified that they had no recollection of the making of the deed in the first place ; Dorian testified both ways; Prentiss and Dorian contradict each other. Their credibility is, to say the least, questionable. Hopkins, who would have known about the alteration, was mentally unfit to testify.

The General Term of the court below made the grave mistake of assuming that the presumption was in favor of the validity of the deed, and that the burden of proof was upon the party assailing it, to prove that the alterations were made before execution. It held that the charge that the deed had been fraudulently altered must be satisfactorily made out by Mrs. Hitz, and reached the conclusion that "the alteration was made before execution and acknowledgment." And that court then further declares that: "*Even if this were doubtful, it is clear that it was made before delivery to the grantee, and while it was in the hands where Mrs. Hitz left it.*" This doctrine is directly contrary to that established by this court in *Drury* vs. *Foster*, 2 Wall., 24. (See 2 Mackey, 513, 526.)

5. *The attempted disposition of the interest of John Hitz in his wife's property inherited by her prior to the act of April* 10, 1869, *for the purposes of paying his antecedent debts was in violation of the provisions of that statute.*

This statute (now section 727, R. S., D. C.) is in the following language:

"In the District, the right of any married woman to any property, personal or real, belonging to her at the time of marriage, or acquired during marriage in any other way than by gift or conveyance from her husband, *shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, nor liable for his debts.*"

Here is a direct prohibition against the disposal of such property, situated as was that involved in this case, for the payment of the husband's debts. It "*shall not be subject to the disposal of her husband nor liable for his debts.*" It was the plain intention of this act to protect a married woman from just such transactions as was this one. If the act has any operation whatsoever upon the rights of a husband, where marital rights had attached prior to the enactment of the law, it must be this. That it did effect these rights has been settled by this court in relation to the property belonging to this very estate (*Hitz* vs. *Bank*, 111 U. S.. 723); in that case the court suggested this interpretation of the act, although a decision on the point was expressly withheld. But the court says, in relation to this class of cases, that "the enactment that her property should not be liable for his debts, because he held some right of present control, was, in accord with the spirit of the main principle of the statute."

If this construction of this act be the correct one, then the deed of Mrs. Hitz to Crane, and of course the trust of Crane to Tyler and to secure Jenks, if ever so binding upon Mrs. Hitz, could not operate upon the property during the life-time of Hitz.

The attention of the court is invited to the opinion of Mr. Justice WYLIE, in deciding the case in the Special Term in January, 1881, found in the record, p. 78. The opinion of the General Term is reported in 2 Mackey, 513.

The Disposition of Rents Collected.

JANE C. HITZ,
Appellant,
vs.
WILLIAM P. JENKS'
Executors.

No. 468.
October Term, 1887.

This cause is the concluding part of the foregoing cause No. 28. The General Term of the court below, by its decree of Dec. 11, 1883, reserved the question of the disposition of certain rents which had been collected, pending the cause, by the original complainant Keyser. Afterwards, and on the 13th of November, 1884, an order was made referring the cause to the auditor to state the account of this complainant as to these rents (9). The auditor, upon the papers and evidence in the cause, and upon further proofs submitted to him, stated the account of Keyser and distributed the fund reported by Keyser as by him collected.

Keyser took possession of the property in dispute in the cause soon after he became receiver of the bank, and sometime in November, 1878, and kept

possession thereof until after the decree of the General Term in Dec., 1883. He collected all the rents. He took possession without any authority; it seems that John Hitz gave him possession of several pieces of property which belonged to him—Hitz—and this piece, either by accident or design, was also seized by Keyser.

When the Special Term issued the injunction to prevent the sale under the Crane trust, on the 21st of Feb'y 1879, the order required an undertaking (see R., in the main part of the case No. 28, p. 31) with surety (*i. e.*, according to the 41st Rule of the court), but Keyser never gave such an undertaking. He did file an undertaking as receiver (see this R., p. 35). When the Special Term passed the decree in the case, on the 28th Nov., 1881 (see R. in 28, p. 87), complainant Keyser was directed to account for the money he had collected, and Tyler was appointed receiver to take charge of the property; but afterwards, Dec. 15, 1881, this order was modified, and Keyser was permitted to collect rents, but was required to pay into court all rents accruing after December 1, 1881. This he did, and the fund thus paid into court amounting to $3,963.00, after paying allowances, together with the net amount retained by Keyser prior to that date, amounting to $6,175.95 (after paying allowances), constitute the subject matter of dispute in this branch of the case. (See this Record, pp. 15, 16, 17.)

The auditor reported the balance of the rents collected by Keyser up to December 1, 1881, after making proper allowances, at $6,175.95; but the testimony showed that Tyler had paid this money over to the Comptroller of the Currency, and probably for

that reason the auditor made no recommendation as to this amount, but left it to be disposed of by the court. The amount remaining for distribution—of the sums collected after the decree of the Special Term—was $3,963.08. Out of this the auditor allowed certain unpaid taxes, leaving a balance of $2,846.56, which he awarded Mrs. Hitz (18), as the owner of the property and by virtue of certain conveyances made by her husband (31 and 34).

Keyser, Jenks, and Mrs. Hitz each filed exceptions, and, after argument, the court made a decree (41) sustaining some of the exceptions and overruling others. All of Mrs. Hitz's (30) exceptions were overruled. By this decree of the general term the court made no direction whatsoever as to the $6,175.95, which Keyser had collected and misappropriated, but it directed that the fund in court be applied to the payment of taxes. From this decree Mrs. Hitz appealed.

After the decree of the General Term of December, 1883, Jenks proceeded to sell under his trust from Miss Crane, and a deed was made to the purchaser and recorded (see p. 33).

Mrs. H. assigns for error and complains that the whole of this fund was not given to her.

Points and Authorities.

Keyser, the original complainant, was a mere trespasser as to the property in question. He probably took possession under the impression that the Donaldson trust (as he alleged in his bill) was still sub-

sisting, having been unlawfully released. But now it has been decided that this debt was paid, and that the trust was released properly, and no appeal has been taken.

Keyser himself came into an Equity Court praying for its aid in reference to the property, and placed himself under its jurisdiction in the matter, and he ought to be compelled to act justly. The cross-bill of Mrs. Hitz (57) prayed that Keyser might be called upon to account for all sums collected by him from the property, and he should be made to account for the sum which he unlawfully collected by a proper decree. Both the Special Term and the General Term required him to account, and he did so, by reporting the amount collected and declaring that he had disposed of the fund to suit his own very peculiar notions. The court below let the matter stand in that way. Of this Mrs. Hitz complains.

It is submitted that both decrees of the General Term should be reversed with costs, and that the deed made by Jane C. Hitz and John Hitz, her husband, to Sarah L. Crane, bearing date June 16, 1877, and recorded in Liber 857, folio 409, of the Land records of the District of Columbia, and also the trust deed from Sarah L. Crane to Richard W. Tyler, dated on the 18th day of June, 1877, and recorded in Liber 857, folio 411 of said Land records, should be decreed to be null, void and of no effect; and Benjamin U. Keyser should be decreed and required by every means of coercion known to the practice in equity courts, to pay over to Jane C. Hitz the sum of $6,175.95 with interest thereon, from December 1, 1882; Mrs. Hitz should be awarded the whole of the

fund in court; the defendant, Richard W. Tyler, and also the legal representative of William P. Jenks (who is now dead), should be required to account for the rents of said property since January, 1884, and said Keyser and the estate of Jenks should be charged with all the costs of these proceedings.

As to the money paid into court, Mrs. Hitz is clearly entitled to it, on the ground that the deed to Miss Crane is void, for the reasons stated in the first part of this brief. If the court should be of the opinion that the Crane transaction is valid, then it is submitted that, on the authority of *Teal* vs. *Walker* (111 U. S., 242), she is still entitled to these rents. Jenks took no effectual steps to gain possession of the property. The possession of Keyser was received from Hitz, and was therefore, in contemplation of law, the possession of Mrs. Hitz.

The attention of the court is invited to the opinion of Mr. Justice MERRICK, delivered in the General Term on this branch of the case. (4 Mackey, 79.)

ENOCH TOTTEN,
For Appellant.

123-297

123-297

IN THE

Supreme Court of the United States.

OCTOBER TERM,

1887.

JANE C. HITZ, *Appellant,*
vs.
WILLIAM P. JENKS, *Appellee.* } No. 28.

SAME
vs.
SAME. } No. 468.

BRIEF FOR APPELLEES.

BERESFORD, PR.

Statement.

These two appeals are from the action of the Supreme Court of the District of Columbia, at different stages in the same suit.

The suit in which these appeals was taken is a proceeding by Bill in Equity brought in the Court below in January, 1879, by B. U. Keyser, who, about the 1st of November, 1878, was appointed Receiver of the insolvent German American National Bank, of Washington, D. C. This Bank had its origin in the German American Savings Bank, organized in 1873, under the General Incorporation Law of the District of Columbia.

In May, 1877, the Savings Bank was changed to a National Bank, carrying with it the assets and liabilities of the former institution. Of both Banks—from beginning to end—John Hitz was President, and C. E. Prentiss was Cashier.

The purpose of the bill filed by Keyser was to enjoin a sale threatened to be made by R. W. Tyler, as trustee, under a certain Deed of Trust, from Sarah L. Crane to him, executed in June, 1877, conveying property in square 405, Washington, D. C., (for convenience designated the "Ninth and G streets property,") to secure the payment of the principal and interest of a certain promissory note for $20,000 drawn by her in favor of John Hitz and by him endorsed to W. P. Jenks, and which Deed of Trust was, according to the record, the first encumbrance on the property.

To give him capacity to institute such suit, and to show an equity that would sustain it, Keyser set out, alleged and charged as follows: That he was the duly appointed Receiver of the National Bank which had inherited from the Savings Bank, as part of its assets, two certain promissory notes, drawn by one Chipley, in favor of E. P. Halstead, trustee, in the sum of $10,000 each, dated in January 1876, and payable, with interest, at the rate of 10 per

cent. per annum, payable semi-annually, in one and two years after date respectively; that these notes were secured by a deed of trust from John Hitz and Jane C. Hitz, his wife, to R. B. Donaldson and C. E. Prentiss, trustees, covering this Ninth and G streets property; that these notes were before maturity and for a valuable consideration, passed to the Bank, the consideration given by the Bank passing solely to the defendants, Hitz, or "one of them;" that in June, 1877, the defendants, Hitz, Donaldson, Prentiss and Halstead conspiring to defraud the Bank, and knowing that the indebtedness evidenced by the notes had not been paid, procured and executed a release of the deed of trust securing these Chipley notes; that cotemporaneously with the execution of this release the defendants, Hitz, executed a deed in fee to one Sarah L. Crane, of this Ninth and G streets property, without any real consideration passing therefor; that thereupon Miss Crane, conspiring with the defendants, Hitz, and others, executed a deed of trust to Tyler to secure Jenks, &c., (the purport of which has already been given;) that in November, 1878, Miss Crane conveyed to Keyser the said Ninth and G streets property in trust, to secure the payment of the Chipley notes; that Tyler was Jenks' agent, and by reason of the proximity of his office to that of the Bank, and of Halstead's, was chargeable with notice of the want of due execution of the power reposed in them by the trustees, Donaldson and Prentiss, in giving the release; that the property would not satisfy both the Jenks lien and the Chipley lien; and that the defendants, Hitz, are insolvent, with the exception of a certain parcel specified.

This bill, incidentally, also sought discovery from the various defendants, and prayed for a reinstatement of the Chipley trust for Keyser's benefit; or, failing in that, a personal decree against the parties.

The scheme of the bill is, that there was a fraudulent release of the original encumbrance, without payment—of which the later encumbrancer, who thereby was enabled to acquire a prior Record lien, was chargeable with notice.

The attempt to charge Jenks with any notice of anything because the Broker, through whom he loaned his money, had an office near, or next, the Bank, deserves and admits of no answer. It would almost seem to have been introduced into this bill as a bit of pleasantry, actual or intended.

It may be remarked, however, that all the vigilant, and protracted, and exhaustive effort of the Plaintiff failed to find anything more than this proximity of offices to bring home to Tyler any notice of any invalidity or informality in any of the steps of the transaction by which he loaned Jenks's money.

Tyler was, indeed, singularly careful and painstaking to see that everything was right, and rightly done. His history of the transaction and of his connection with it, to be found in his testimony, (commencing at page 192 of the [printed] Transcript in No. 28,) is very full and straightforward. It was not shaken by cross-examination, and was not contradicted by the testimony of other witnesses. Commending it, as a whole, to the attention of the Court, we content ourselves with a concise abstract of it.

Captain Tyler was an Insurance Agent and Broker in this city; he was introduced to Mr. W. P. Jenks, of Philadelphia, who, in June, 1877, informed him that he had $15,000 or $20,000 which he would loan on property in this District. Tyler had an offer for $15,000; he had some doubts about the security, and spoke to Mr. Hitz, whom he knew, in relation to it. Mr. Hitz shortly thereafter informed him that the German American National Bank, which had recently been changed into a National Bank from the German American Savings Bank, had a considerable amount of real estate securities coming to it from the Savings Bank, upon which it would like to realize, and named these Chipley notes, aggregating $20,000. He proposed to borrow this amount at 8 per cent. per annum interest, and take up the Chipley notes, and to secure the loan by a trust upon this Ninth and G streets property. As he was president of a bank and of an insurance company, he did not desire to

appear on the record as a borrower, and he therefore proposed to have the title to the Ninth and G streets property vested in Miss Crane, and to have her give a note to his (Hitz's) order for $20,000, and secure it by a deed of trust upon the property, and he (Hitz) would then endorse the note over to Tyler, or Jenks.

Tyler satisfied himself of the value of the security offered. Indeed, at that time Mr. Hitz's name alone on paper was "good" for much more than $20,000. He consulted his conveyancers, Ashford and Hopkins, men of known eminence and ability in their specialty, and was assured by them that there was no legal impropriety in making the arrangement as to Miss Crane, which Hitz had suggested. Tyler had the title searched, and though it has no bearing in itself on this case, it is proper to refer to the care exercised in respect of an outstanding dower right in the property of Mrs. Shanks, the mother of Mrs. Hitz. The dower right was of little importance any way; there had been also some legal steps taken to compound Mrs. Shanks' dower in her husband's estate as a whole, and she was old and infirm (dying about the time Keyser filed his bill). Yet this was an obstacle that blocked the negotiation until the conveyancers had given a certificate minimizing the possible effects of this dower right, and Tyler had made a special trip to Philadelphia to lay the whole matter before Jenks. This incident is mentioned as indicative of the thorough thoughtfulness with which Tyler conducted this whole transaction. It illustrates his methods and goes far to negative any accusation of any sort based on neglect or carelessness by him. It shows that he sought to know what weak points, if any, there were in the transaction, and whether there was any loophole through which a dishonest debtor, after getting Jenks's money, could avoid his or her responsibility.

Indeed, Tyler would not part with Jenks's money and pay it over until all the steps necessary to secure it had been taken of Record. He testifies that his custom was in mak-

ing loans where the money he supplied went to discharge prior encumbrances, to first have all the papers prepared and executed, and then to have the deliveries, exchanges, &c., all take place in the Recorder's office. In the present case the Release from Donaldson and Prentiss, the Deed-in-Fee to Miss Crane, Miss Crane's making the Note to Hitz, and executing a Deed of Trust to secure it, were all consecutive steps to be taken by the borrower, independent and individual, it is true, each in respect of itself, and considered apart from the others; yet so blended in, and related to the transaction in which they culminated, that that transaction was unitary, and its members, practically, concurred in time, as they did in effect.

Mr. Hitz, the President of the Bank, had represented the Chipley notes as the property of the Bank, and had sought the loan from Jenks to take up the Chipley notes. Tyler had also been told by the Cashier of the Bank, Prentiss, that the Chipley notes were owned by the Bank, and had conferred with him as to the details of the transaction by which the President of the Bank had proposed to retire those notes. So, when the papers had been prepared, and the Certificate of Title was ready, Tyler went to the Record office and, after everything was pronounced "all right" by his conveyancers, went back to the Bank whose Cashier had told him that "the notes were in the Bank and owned by "the Bank," and paid to this Cashier, "over the counter," the check "for the purpose of paying those notes," and "it "was so understood by him (Prentiss), and me (Tyler), at "the time." This check this Cashier endorsed "for acc't "of the German American National Bank, Washington, "D. C., C. E. Prentiss, Cashier," and the check was duly paid by the Girard National Bank of Philadelphia, on which it was drawn.

Of course this evidence effectually disposed of Keyser's pretensions to any superiority of lien over Jenks, for he had no better title than the Bank of which he was Receiver could have asserted. And in no Court of Conscience would

the Bank have been heard, under these circumstances, to deny, as against an innocent purchaser, without notice, the receipt of that purchaser's money for the specific purpose of discharging the Chipley notes.

Keyser sought also to bolster up his claim to the Ninth and G streets property, by a conveyance from Miss Crane, made subsequent to the failure of the Bank.

The Court in Special Term found no trouble in dealing with that question, nor did the General Term. As matter of law it cannot be questioned that after Miss Crane had served her purpose as a vehicle of title, to enable John Hitz to borrow money upon the property in question, she had no such proprietory interest in the residuum of the property nominally—though not beneficially nor really—vested in her, that she could convey it to Keyser or anyone, but the real party in interest, Mrs. Hitz, whose property it was.

As matter of fact, it was apparent that Miss Crane executed the conveyance in question, at what she understood to be Keyser's request, and made the conveyance applicable to the "Chipley notes" without any personal knowledge of the matter, but relying on what she had understood to be Keyser's statements and requests.

The testimony to which we have referred was not taken until after answers to Keyser's Bill by the Defendants.

Two of the Defendants were not satisfied to rest upon answers. Mrs. Hitz and Miss Crane filed Cross Bills. The latter sought the cancellation of her "guaranty" of the Chipley notes and her conveyance to Keyser. Probably this relief could have been had without a Cross Bill. Certainly the Cross Bill which did ask it was strictly in the line of the defense set up by the Answer, and strictly responsive to that portion of Keyser's Bill which related to her.

Mrs. Hitz's Answer denied any recollection of ever having signed the Deeds to Donaldson and Prentiss and Miss Crane, and alleged that if such deeds existed and were signed by her they were frauds upon her, and that she did not know what she was signing.

The Cross Bill of Mrs. Hitz had not the merit of responsiveness that attached to Miss Crane's. It was an attack upon Jenks, rather than a defense to Keyser, and, more than either, was an assault upon her husband.

It may be questioned whether there is any authority to sue a Receiver of a National Bank. The law permits him to sue, but is wholly silent as to his being sued. We know of no authoritative adjudication of this precise point. But, granting that a Cross Bill may be filed against him in a suit which he had brought, every rule of equity pleading and all precedent require that the Cross Bill shall *not* present "an entirely new controversy, not at all necessary to be decided to have a final decree on the case presented in the original bill."

The object of Keyser's bill was to establish a lien for his Bank upon the Ninth and G streets property, and to prevent a sale by Tyler for Jenks's benefit. This object could have been attained (had the proof justified it) without any inquiry into the personal relations between John and Jane Hitz, or the merits, or demerits, of his management of her estate. And, as it seems to us, Mrs. Hitz's Cross Bill involved a controversy with Jenks, and sought a relief as against him, which were not necessary incidents to, nor adjuncts of, Keyser's claim to a lien upon the Ninth and G streets property.

If this were not so, and if Mrs. Hitz stood firmly in Court upon her Cross Bill, she utterly failed to substantiate her charges of fraud upon her in the procurement of her signatures to the Donaldson-Prentiss Trust and the Crane Deed. Her signatures, which she did not recollect to have made, she was compelled, under the exigency of examination, to admit.

The Notary before whom she acknowledged the Deeds was positive that in all the three acknowledgments by Mrs. Hitz he had taken, (there were two before the Bank failed and one after,) he had asked her if she knew the contents of the paper and freely executed it, &c., &c.

With all the anxiety which a possible escape from a pecuniary liability could engender, Mrs. Hitz was unable to prove by her own, or anyone's else testimony, that she didn't sign those Deeds. It is true that she testified that she did not know the purport of these papers when she signed them, if she did sign them; but the Notary swore that she said she did, and assented to them when she acknowledged the Deeds. More than that, Mrs. Hitz, both from her own testimony in the case, and by the testimony of others, is shown to be a woman of brains, and one not likely to be hoodwinked as to her property unless she was willing to be hoodwinked. *Vult populus decipi: decipiatur*, says the proverb, which has its analogue in the Law maxim *Volenti non fit injuria*. But granting she had been imposed upon as to the Donaldson-Prentiss Trust, such imposition could not be a defence in equity against the claim of one who, in good faith and without notice of any such imposition, had relieved her property of the encumbrance created upon it by that Deed. There was no obligation, in law, morals, or reason, upon the innocent purchaser to protect the prior vendor after her act against the consequences of that act. On the contrary, the obligation was on her not to put on record a solemn act without knowing its meaning, scope, and purpose; especially so when, whether it were necessary or not, there were added to Mrs. Hitz's acknowledgments the special safeguard formerly provided by statute for married women.

The Appellant has not printed in the Transcript the Opinion of the Court in General Term, from the Decree in accordance with which she has appealed. We give it in Appendix "A." It is to be found in the Report of the case in 2 *Mackey*, *p.* 513.

In the Opinion of the Special Term, printed by the Appellant, (T., 78–86,) Justice Wylie treats Mrs. Hitz's signature to the Deeds and her liability under the Donaldson-Prentiss Trust, as established, not to say conceded, facts. So does the Court in General Term.

We are justified, we think, in saying that Mrs. Hitz's case

was as hopeless as Keyser's up to the time of filing her amended Cross Bill. This was filed just as the suit was about to be heard on the prior pleadings and testimony; and it introduced another feature—the only one which, so far as the Appellant is concerned, had any weight with the Justice holding the Special Term. This feature was an alleged material alteration of the Deed to Miss Crane after Mrs. Hitz's signature and acknowledgment. Mrs. Hitz contended that this Deed was originally drawn and executed as a deed from her alone; and that subsequently it was made into a Deed from her and her husband by interpolation, interlineation, and erasure.

The leave to file the amended Cross Bill of Mrs. Hitz was obtained November 20, 1880. The deed which it attacks was produced in evidence October 6, 1879, more than a year before. During all this time this deed was accessible to counsel, and open to inspection by parties. A litigation protracted and bitter, and involving a large amount pecuniarily in which this deed figured, had been in progress for more than a twelvemonth. The deed had been examined by counsel and parties interested in overthrowing it, and by counsel and parties interested in sustaining it. Yet these alleged "alterations" were never seen nor heard of in this controversy until the 12th of November, 1880, when for the first time Mrs. Hitz's counsel saw them, showing them to Mrs. Hitz upon the next day. This may not be "suspicious," but it certainly casts a certain shadow of doubt upon the existence of such alterations, &c., at the time the deed was sent to record.

An affidavit was made by one Dorian, a young man who had been in the employ of the bank, under circumstances that do not bear the impress of uncontrolled, uninfluenced, and voluntary action which gave color to Mrs. Hitz's contention in her Cross Bill. When he got by himself, and after careful exploration of his memory, he saw that he had committed an error, and he made an affidavit characterizing his former statement as a mistake.

Save in so far as this first affidavit may affect the question of his credibility, it has, as was pointed out by the court below, no place in the case. The most rigorous cross-examination failed to shake his distinct testimony to the contrary of Mrs. Hitz's contention. He was positive that he prepared the deed for Mr. Hitz's signature as a party thereto before Mrs. Hitz signed it. The Court below in General Term believed him. Dorian was the only person who could testify about this matter from positive recollection. The conveyancer, Hopkins, had been stricken with disease, and his mind was a blank. Ashford had intrusted to Hopkins the details of the preparation of the papers; he supervised generally Hopkins' work, and accepting the correctness of its details, concurred in its result and the conclusion from it. Neither Prentiss, Hitz, or Tyler had such special recollection as enabled them to give positive testimony, though all were clear that they could not, without violence to their habit in such matter, have done or assented to what Mrs. Hitz had asserted, and afterwards tried to convince herself, was done.

The notary who took the acknowledgments could throw no light upon the matter. So the deed itself was interrogated and recourse was had to what is called expert testimony. Some lawyers, a plate-printer, an engraver, and Keyser thought the alterations of the deed were made after the notary's seal had been impressed to the acknowledgment of Mrs. Hitz. Expert evidence to the contrary was introduced by the defence. The Court below sums it all up thus:

> A number of witnesses, including experts in processes and in the effect of mechanical processes, and lawyers who spoke from their professional habits and knowledge, were examined as to the question whether the seal which accompanied Mrs. Hitz's acknowledgment was impressed above one of the erasures, or had itself suffered by the process of erasure, thus showing that the erasure was made after the acknowledgment. We have very

> carefully examined both the testimony of the witnesses on this matter and the paper itself. It may be sufficient to state that most of the experts were of opinion that the seal was impressed after the erasures had been made.

No one can examine this expert testimony without being convinced that it is not in numbers alone that the advantage is with the defence. Of no species of testimony is it so true as of expert testimony that it should be weighed, not counted. Expert testimony is nothing if not scientific, and in this respect it is clear that Mrs. Hitz's witnesses are inferior to those to whom they are opposed.

Aside, however, from this expert testimony, there are other controlling considerations.

The theory—for it is nothing more than a theory—that Austin's seal to Mrs. Hitz's acknowledgment had suffered from erasure, involves a degree of moral obliquity in one or more persons not shown by anything else in this Record to exist; and also involves an amount of carelessness and negligent oversight on the part of Tyler and Hopkins and Ashford, which it is difficult for those to believe who have seen the scrupulous care taken by Tyler in the preceding steps of this transaction—fully set out in the testimony herein—and who know the reputation for professional accuracy that Ashford and Hopkins had rightly earned. It involves also an effacement of Dorian's positive testimony. So that the Court below was quite right in saying, in continuation of what we have cited above:

> An allegation, or more properly, an accusation of this kind, must be satisfactorily made out, in order to justify a Court in holding a deed void for alteration; and this charge has not been made out. Taking the testimony of the only witness who speaks from personal observation as to the presence or absence of a signature when he made the alteration, and the supporting testimony of the experts, we are compelled to the conclusion that the alteration was made before execution and acknowledgment.

The Court, in its Opinion, states another fact in the case, and draws a conclusion from it in these words:

> Even if this were doubtful, it is clear that it was made before delivery to the grantee, and while it was in the hands where Mrs. Hitz left it. *There is nothing to show that the grantee knew or was charged to know that the alteration was made without the knowledge and consent of the grantors.*

The Court then proceeded, after summarizing the conclusions at which it had arrived, to pass the Decree from which the Appeal was taken, and allowed in No. 28 in this Court. Mrs. Hitz was the sole Appellant. Keyser—having spent the substance of the Bank which he was appointed to conserve in a litigation that would probably have never been begun if he had known the facts of the case, as it was his duty to know them, and had reported them to his counsel—defeated on every point, acquiesced in the decision and devoted his remaining energies to fighting for the "surplus" and "rents" referred to in the Opinion of the Court, and "reserved" by the Decree that—in the words of the Opinion—

> the parties claiming to be interested may litigate their rights by proper further proceedings.

The Injunction having been dissolved, the Trustee proceeded to sell the property and realize what he could from the proceeds for Jenks.

"Further proceedings" were had. The sale having failed to produce enough to pay Jenks's debt, he claimed to be made whole from the fund in Court, which fund was the net proceeds of rents collected by Keyser during the pendency of the suit. It appeared that Keyser had collected, prior to the Order which was passed by the Court in Special Term, December 15, 1881, (suspending a prior Order appointing Tyler Receiver *pendente lite*,) some $6,000, which he had turned over to the Comptroller of the Currency to be

applied as dividends to the Bank's creditors. Subsequently he collected, net, $3,963.08. The Auditor made no distribution of the $6,000—left it, we suppose, for "further proceedings," or accepted Keyser's cavalier treatment of it as having placed it beyond the reach of the Court. Out of the $3,963.08 he allowed $99.63 costs of the audit, appropriated $1,058.59 to satisfaction of taxes, accruing subsequent to the order of December 15, 1881, and awarded the balance to Mrs. Hitz. Upon exceptions filed by Keyser, Jenks and Mrs. Hitz, the Court in General Term held that the Fund was liable for the Taxes, and directed that the $3,863.45 (not $3,363.45, as misprinted on page 42 of the Transcript in No. 468,) be applied by Tyler to the payment of those Taxes. Keyser acquiesced in this Order or Decree; and Mrs. Hitz appealed, or tried to, to this Court. Her appeal was not "allowed" by the Court below, and no proceedings have been had to compel an allowance by that Court.

From our Review of the Records in these cases we have puposely eliminated a vast amount of matter foreign to the precise and only issues to be met here. We have not commented, as we might have done, upon the irrelevancy of a great portion of the voluminous testimony, nor have we spent any time over the irregularities attending the Chipley notes and their treatment by the Bank; for all this has nothing to do with the issue, now here, between Mrs. Hitz and Mr. Jenks.

Points.

I.

As between Keyser and Jenks there is no controversy here.

Keyser has accepted the Decree below, and is not here to be heard against it. Nor, if he were, would this Court give

him any countenance. The Bank—and Keyser as its representative in liquidation—are estopped by the action of the Bank's officers from denying the payment of the Chipley notes with Jenks's money.

II.

It is indisputable that Mrs. Hitz executed (jointly with her husband) the Deed of Trust to Donaldson and Prentiss whereby the Chipley notes were secured on the Ninth and G streets property.

It was not contended at the hearings in the Court below—whether in Special or General Term—that she did not execute that paper. The fact of such execution was not impeached, though it was claimed that she was led by misrepresentation or concealment to execute a Deed of the purport of which she was ignorant.

Her own asseveration is the sole proof offered of this allegation.

If, however, we accept all Mrs. Hitz has to say on this point, without any reserve, and give to her declarations in her own behalf the very highest weight that could be given to impartial testimony, there is still nothing whatever to show that Tyler, much less Jenks, was cognisant of this alleged fraud, or a party to it, or even charged with inquiry as to the antecedents of the Record encumbrance which was to be relieved.

III.

Jenks's money extinguished this encumbrance.

The receipt, by the recognized officers of the Bank, of that money, for the purpose of discharging the Chipley notes, estopped the Bank, whether alive and active or in liquidation through a Receiver, from resort to the Trust to Donaldson and Prentiss. So Jenks became entitled to all the equities which generally, or by virtue of the Record

system of the District of Columbia, attached to a subsequent purchaser for value without notice.

In *Jackson vs. Williams*, 107 U. S., 478, which was a contest between a second encumbrancer, who had no notice of the fraud through which a prior encumbrancer had been choused of his security by the act of the mortgagor (and others), the Court held (p. 484) that the equity of the subsequent encumbrancer was "*at least equal*" to that of the prior encumbrancer. If equal in that case, and under such circumstances, the conclusion is irresistible that in this case the equity of Jenks is superior to that of Mrs. Hitz.

Should it, however, only be an equal equity, the Court in considering any informalities or irregularities alleged to exist in any of the steps of the discharge of the first encumbrance by the second—a discharge beneficial to the owner of the encumbered property to the extent of at least $400 a year—will show as much favor to the one as the other.

IV.

That Mrs. Hitz did execute a Deed to Miss Crane of the property in question is undoubted.

The frame of that Deed when she executed it, and what happened to it afterwards, are controverted.

Mrs. Hitz contends that the deed was originally drawn as a conveyance from her alone; that she executed it in that condition, and that, subsequently, by interlineations, alterations, and erasures the deed was changed to a joint deed from herself and husband, and as such, without any re-execution by her, was executed by him.

This contention, as we have already informed the Court, is unsupported by a scintilla of positive evidence.

Mrs. Hitz had, before the "discovery" of this fraud, sworn that she remembered nothing about the circumstances attending the signatures of the Donaldson-Prentiss Trust or Crane Deed.

There is no dispute that this Deed was originally drawn

for execution by Mrs. Hitz alone as Grantor: and that, subsequently, it was adapted to execution by Mrs. Hitz and husband. The date, relative to the execution by Mrs. and Mr. Hitz is alone in dispute.

We have already referred to the testimony taken under the amended Cross Bill.

Dorian's testimony is, as we have said, the only direct testimony from personal knowledge, as to the date of the alterations. It begins on page 522 of the Transcript, and is continued on pages 540 and 547.

He is positive that a printed blank was brought him to be filled out into a Deed from Mrs. Hitz as "Party of the First Part;" that he wrote in what he supposed necessary; that it was subsequently brought back to him, and he was told to alter it into a Deed from Mrs. Hitz and John Hitz, her husband; that this was done; and that certain scratches of the pen and making of "seals" were had to make the paper conform to the change from one to two "Parties of the First "Part;" and that when this was done Mrs. Hitz had *not* executed the Deed.

This direct testimony of Dorian's is supported by the indirect testimony of Ashford, Tyler, and Prentiss. Neither of these could swear positively to the condition of the paper when Mrs. Hitz executed it. But they all disclaimed any knowledge of such a condition as Mrs. Hitz's contention involved.

Dr. Prentiss's testimony begins on page 602 of the Transcript. He says, (p. 603:)

> I don't think there is any [truth in Mrs. Hitz's averment as to the date of alteration;] I know there is none. I had charge of the transaction, and I never in any way directed anybody or myself to alter the deed after it was executed.

And again on page 605:

> Q. Dr. Prentiss, do you suppose that if you, directly or indirectly, had altered a sealed paper after its exe-

cution and acknowledgment, or that such alteration, by whomsoever done, had been brought to your knowledge, you could forget the circumstance?

A. No, sir; I am sure I could not forget it.

Mr. Ashford's testimony begins on p. 617 of the Transcript. He testified that the details of the examination of the title, &c., in this transaction had been conducted by Mr. Hopkins, and that he had assisted and advised and concurred with him; that (p. 618) Hopkins had been associated with him in business for some two years; that—

I had seen a good deal of Mr. Hopkins before he came to my office, when he was in the office with Colonel Payne. I observed his mode of doing business and his accuracy in his investigations in the Record office, and that was the reason that led to his being associated with me, I think. I found him to be a man of studious habits and scrupulous accuracy.

On page 620 he says:

Q. Was he a man to condemn a deed because executed by a married woman alone, and to accept that same deed after being altered, so as to be the deed of husband and wife, and then executed by the husband without re-execution by the wife?

A. I think not; I am satisfied he would not.

Q. Is it possible you ever did such a thing?

A. No; I think not, sir.

What has already been alluded to should be borne in mind, viz: that this Deed was "in evidence" and subject to the treatment that papers are wont to receive where there are many Parties and many Counsel, for over a year before these "alterations" attracted any notice from any of the persons interested in this controversy. How much during all that time "natural wear and tear" of themselves, and without evil action, or evil intent in any one would have sufficed to give to this Deed a worn, frayed, and generally

ragged appearance, we can only conjecture. But the Court will bear in mind that no one gives any evidence that the Deed had the "suspicious" appearance it presented when this special inquiry was begun at the time it was sent to Record.

Of what is disclosed by the paper itself we have also spoken. The majority of the "experts" do not think that the paper itself sustains Mrs. Hitz's accusations; and some are clear that it flatly contradicts them. The chief point made for the accuser was that in the relief impression of the Notary's seal there were flattened letters, &c., coincident with the lines of erasures by scratching. From this the conclusion was jumped at that the pressure of the knife in erasing had flattened down these letters. But it was shown that the Notary's seal made, generally, defective impressions of certain letters; also that the manner of holding the paper under the seal was a factor. In one word, it was shown that the effect charged to have been produced by a certain cause could be just as well produced by another. Now, a physical demonstration of the cause of a phenomenon is not conclusive unless it is also exclusive. When, in a physical examination, the student finds that the effect he is investigating *may* be due to several causes, he seeks some crucial test to discriminate between these possible causes.

No such test is found or suggested by Mrs. Hitz's witnesses.

Mr. Philip T. Dodge, examined with a trained mind and a trained eye, these impressions of the seals, &c. He found (p. 633)—

> after a careful examination there is nothing in or about the impression which can be relied upon as indicating that the erasure must have been made subsequent to the application of the seal,

and saw "several things which pointed in the direction" of "indicating that the erasure was made before the seal

"was put there." The most striking of which, perhaps, (p. 633)—

> is a break or rupture in the sheet, occurring in the erasure between the inner and outer rims of the seal. The fact of this break occurring at that point would indicate that it was in consequence of the weakness of the paper at that point at the time of the application of the seal, and the paper having consequently yielded at that point to the strain of the seal.

The Deed has been sent up here with the transcript for inspection. Perhaps what was visible to the "experts" and others some six or seven years ago in this paper of flimsey fibre, can still be seen. Any way there were then evident what sufficed to render

> most of the experts of the opinion that the seal was impressed after the erasures had been made.

Whether, therefore, we consider the direct testimony of living witness; the confirmation afforded by habits of business and accurate professional methods, negativing the charges made; or the evidence of the paper itself, as read out by the experts, we must conclude with the Court below that

> the alteration was made before execution and acknowledgment, and, therefore, did not affect the validity of the deed.

V.

The alterations, as is well stated by the Court below, were made before the Deed was delivered to the grantee, and while it was in the hands where Mrs. Hitz left it; and there is nothing to show that the grantee was so much as put upon inquiry as to these alterations, much less had any notice of anything wrong.

VI.

Was the joinder of the husband in the Deed of Mrs. Hitz's property necessary? If it were not, and the alteration of the Deed had been made after execution by Mrs. Hitz—as it was not—so as to admit Hitz, it was immaterial. In its altered state it wrought no injury to Mrs. Hitz. It conveyed nothing that *she* had, only something that *he* had. She was in as good a position as if the alteration had not been made.

Justice Wylie, at Special Term, held that where in the District of Columbia a married woman conveyed her property, the husband must join in the Deed. The Court in General Term were so fully convinced that the alteration was made prior to the execution that it did not consider this question.

It is our contention that the "Married Woman's Act" does not require the husband to join the wife in a conveyance of her property. That Act provides:

> The right of any married woman to any property, personal or real, belonging to her at the time of marriage in any other way than by gift or conveyance from her husband, shall be as absolute as if she were unmarried, and shall not be subject to the disposal of her husband, or liable for his debts.
>
> Any married woman may convey, devise, and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried.
>
> §§ 727, 728 Rev. St., D. C.

What is meant by *convey in the same manner as if she were unmarried?* Do these words signify that the joinder of the husband shall be necessary to effectuate her conveyance? Do they not on the contrary expressly exclude any such construction? The Legislature, in this enabling act, might have so declared. It might have followed the example of

Maryland, whose Married Woman's Act requires the joinder of the husband. But Congress thought otherwise, and declared that *quoad* the disposition of her estate she should have all the rights of an unmarried woman and act in the same manner.

The estate of Mrs. Hitz in the property in question she had acquired before the passage by Congress of this Enabling Statute. But the Statute does not provide one mode for the disposal of property held by a woman at the passage of the Act, and another for the disposal of property acquired afterwards. Such legislation would be absurd. The language of the Statute repudiates any such distinction. The enactment operates on *rights* and *interests*—rights and interests present, that is, as well as those to come.

See *Wing vs. Schramm*, 13 Hun., 377.
McIlvaine vs. Kadel, 30 How. Pr. Rep., 193; 3 Robt., 429.
Farr vs. Sherman, 11 Mich., 33.
Watson vs. Thurber, Id., 457.

These and other authorities were submitted to the Court below upon the hearing. Since then this Court has had under review this Married Woman's Act—though not with special reference to the power to convey given in it—in *Hitz vs. National Metropolitan Bank*, 111 U. S., 729.

The logic of the Opinion, we submit, sustains our view as to the freedom of the wife from the "protection" of her husband when executing a conveyance. But the Opinion goes further and shows (p. 631) that the Statute purposed to abolish tenancy by the courtesy, and, if so, it left Hitz nothing to convey. Whether he joined in the deed or not was of no consequence, and an alteration that introduced him as a grantor was immaterial.

VII.

The money of Jenks having gone, in good faith, and with-

out notice to him of anything wrong, to discharge a prior valid mortgage standing on the estate of Mrs. Hitz, she cannot be allowed to assail Jenks's security for that money without making restitution and paying back to Jenks, with interest, the money advanced by him.

Seeking Equity she must do Equity. Yet, she makes no offer to do this; on the contrary, she says to Jenks:

> Your money advanced in good faith relieved my property. I will hold this benefit, and your money, too.

If there be any Court where a Suitor may use such language, it is not a Court of Equity.

Sheldon on Subrogation, § 8.
Snelling vs. McIntire, 6 Abb., N. C., 469.
Green vs. Milbank, 3 Abb., N. C., 138.
Gilbert vs. Gilbert, 39 Iowa, 657.
Garwood vs. Eldridge, 2 N. J. Eq., (1 Green's Ch. 145.)
Price vs. Hobbs, 47 Md., 384.
Bowie vs. Berry, 3 Md., Ch. Dec., 359.
Hyde vs. Tanner, 1 Barb., 80.
Bispham's Pr's. of Equity, § 338.
Burnhisel vs. Firman, 22 Wall., 170.
Davis vs. Gaines, 104 U. S., 386.

VIII.

The two appeals—No. 28 and No. 468—are either in two distinct suits, or in the same. If the latter, the appeal in the first case was prematurely taken; if the former, the Court will see that there was no allowance of an appeal.

We content ourselves with simply suggesting this—technical it may be deemed—objection to the regularity of the appellate proceedings.

Should it be held that the appeal from the disposition of the fund is properly here, and the subject of argument, we shall contend that there was no error in applying so much

of the fund as was so applied to the reduction (*pro tanto*) of the taxes upon the property. The Trust Deed from Miss Crane to Tyler expressly states that it is to secure the payment on demand of all sums that may be advanced by Jenks to keep up "Fire Insurance," and keep down taxes, assessments, &c.—in a prescribed method to be sure—but a method to which the Court had, by its Injunction, prevented a resort. It was quite right then that the Court should use the income of the property in reducing the burden of taxes that had accumulated *pendente lite*.

Besides, the Court had appointed a Receiver of the property in question, and had then suspended this appointment and made Keyser (in effect) Receiver. Thus it conserved "not only the *corpus*, but the rents and profits for the satis-"faction of the debt"—to use the language of this Court in *Kountze v. Omaha Hotel Co.*, 107 U. S., 378–395.

There may have been error in the action of the Court below in respect to the disposition made by Keyser of the $6,000 or so, above referred to; but we do not conceive that question to be here for discussion by us.

W. D. Davidge

R. D. Mudd

APPENDIX A.

OPINION OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, IN

KEYSER v. HITZ ET AL., No. 6583, EQUITY.

(Delivered October 29, 1883.)

CARTTER, *C. J.*, and HAGNER and JAMES, *J. J.*, sitting.

Mr. Justice JAMES delivered the opinion of the Court.

The original bill in this cause was filed by Keyser as Receiver, appointed under the national banking law, of the German American National Bank, a corporation organized in the city of Washington. From the voluminous testimony taken on behalf of the several parties, we deduce the following conclusions:

On the 26th of January, 1876, the defendants, John Hitz and Jane C. Hitz, his wife, conveyed to Donaldson and Prentiss certain real estate, in Washington, which she had owned as a married woman before the passage of what is known as the Married Woman's Act of 1869, in trust to secure the payment of two promissory notes, which had been dated of the 5th of the same month, each for the sum of $10,000, drawn by defendant Chipley, payable to the order of defendant, Halstead, in one and two years from date, with interest at the rate of ten per centum per annum. This deed of trust provided that John Hitz, the husband, should occupy and take the rents and profits of the premises until default, and that upon final payment the release should be to him, his heirs and assigns. The notes were duly endorsed by Halstead, to "The German American Savings Bank," a banking corporation in Washington, which was afterwards, on the 14th day of May, 1877, organized, by proper proceedings under the national banking law, as a national bank, under the name of "The German American National Bank, Washington." The notes in question, with other assets of the savings bank became the property of the national bank.

The records of the bank show that *a loan* of $20,000 was made to Chipley, the maker of these notes, on the 26th of January, 1876, the day of the date of the deed of trust, that deed being noted as the security. No such loan was made to Chipley, and it is not shown that any money was paid out at that time to any person on account of this transaction. Chipley and Halstead were merely men of straw, and the use of a security made by them was a contrivance by which Hitz and Prentiss, two of the officers of this very extraordinary institution, proposed to conceal and at the same time provide for certain antecedent transactions. Hitz had incurred considerable liabilities to the bank, which it had become necessary to adjust, at the same time that the savings bank should be enabled to exhibit real estate securities based upon transactions in the customary form of its legitimate business. The actual transaction was indicated when Prentiss, on receiving the notes, wrote under Chipley's signature, the number and name of Hitz's post-office box; and it is established by the testimony that Hitz was the actual party and debtor in the transaction. The intent and the effect of the contrivance was to conceal from the public, and especially from the bank examiner, his improper liabilities to the concern in which he was an officer, to secure them by the usual real estate security, and to fix periods of credit by which the conversion and application of this security should be determined.

Afterwards, in the month of June, 1877, when the savings bank had been converted into a national bank, subject to the provisions of the national banking laws, and among others to that provision which required them to keep on hand a sum of money equal to twenty-five per centum of their notes in circulation and of their deposits, the reserve fund of the German American National Bank was in danger, and it became necessary to replace the Chipley notes and their real estate security with cash. Hitz, being advised that defendant Tyler, as agent or broker for the defendant Jenks, had in his hands the sum of $20,000 for loan upon real estate security in Washington, informed Tyler that he would in a few days be prepared to submit a proposition for that amount, in order to pay the Chipley notes. He explained that it would be dangerous to borrow and secure the money in his own name, and proposed to have the property transferred to some third person, and through that person to consummate the loan. Subsequently certain transactions were

had. By a deed dated June 16, 1877, Donaldson and Prentiss, trustees in the deed which secured the Chipley notes, released the premises to Jane C. Hitz and her heirs, reciting that those notes were paid. On the same day a deed was prepared in which Mrs. Hitz appeared to be sole grantor, conveying the property to one Sarah L. Crane, for an alleged consideration of $40,000, which was not in fact paid. This deed was afterwards altered by erasures and re-writing, so as to include John Hitz as one of the grantors. The circumstances and effect of this alteration will be considered later. This deed was acknowledged by Mrs. Hitz on the 18th and by Mr. Hitz on the 20th of June. By a deed dated on the 20th Sarah L. Crane conveyed the premises to defendant Tyler, in trust to secure her promissory note of that date for the sum of $20,000, payable to the order of John Hitz three years after date, with interest quarterly, at the rate of eight per centum per annum. This note was endorsed by Hitz, with waiver of notice and protest. He thus made his liability absolute, and substantially made himself the actual debtor. Prentiss, who was cashier of the bank, made himself party to this negotiation. Some of the conveyances, notably that from Mrs. Hitz and her husband to Crane, were prepared under his supervision and by his procurement. Throughout the transaction it was understood between Prentiss, acting for the bank, and Hitz, on one part, and Jenks, through his agent, Tyler, on the other, that the original and first lien of the Chipley trust was to be got out of the way and extinguished, and that, to this end, the money lent by Jenks was to be immediately applied by the bank to the payment of the Chipley notes. In other words, although the loan was nominally made to Crane, it was understood to be substantially a loan to Hitz, or for his use, and that he was at the same time to turn the money over to the bank, in order that it might be at once applied to the satisfaction of the Chipley trust. In accordance with this understanding Jenks's check on a Philadelphia bank for the amount of the loan was made payable to the order of, and was by Tyler delivered to Prentiss, as cashier, and it was by Prentiss's endorsement made payable to the German American National Bank when he forwarded it to Philadelphia for collection. By this means this money went directly to the credit of the bank, and became part of its funds, but applicable, both as against Hitz and his wife and as against Jenks, solely to the payment of the Chipley notes. From that moment its ap-

plication was fixed. It does not appear by the books of the bank that it was applied immediately, but as against the bank, and, therefore, as against the complainant, whose rights are only those of the bank, it must be treated by a court of equity as having been applied according to the contract under which it was received. Hence it must be held that the Chipley notes were satisfied on the 20th of June, 1877, if the Jenks loan was sufficient to pay what was due on them, provided the bank authorities could lawfully allow them to be paid in anticipation of maturity, and provided the bank was bound by the transaction carried out by its officers, Hitz and Prentiss. As a matter of fact, the interest on the Chipley notes had been paid at that time, so that the Jenks loan was precisely adequate to the payment of the principal. The question of the bank's power and obligation will be considered.

The actual conduct of the bank officers in the subsequent treatment of the matter was certainly extraordinary. It appears from the bank books that Prentiss undertook to place the money received from Jenks to his own credit in a certain trustee account which included other funds; that for some time afterwards the Chipley notes appeared on the books, and were exhibited to the bank examiner, as living assets; that in October, 1878, in two several entries, they were credited as paid, and that finally on the last day of that month, the day on which the bank went into the hands of the receiver, they were entered as "returned" to the list of assets; in other words, as not paid. These book-keeping statements are entirely immaterial; but if they were material, the admission of payment, made by the bank against its own interest, must outweigh the subsequent statement made in its own favor; especially when the later entry was made under suspicious circumstances. Their actual importance is that they confirm the testimony as to the nature of the contract under which the Jenks fund was received.

It is objected, however, by complainant, that the Jenks loan was made six months before the second of the Chipley notes was due; that this note bore a high rate of interest, and that even the directors, and, *a fortiori*, the officers of the bank, could not make a valid contract to receipt payment in anticipation, because they stood in the strict relation to the stockholders and creditors of the bank of trustees of these notes, and because trustees cannot vary the terms of payment. Numerous cases were cited to us in which the trans-

actions of trustees have been held invalid because they departed in that way from the terms and limitations of the instrument which created the trust. We should give great weight to them if we supposed that the powers of the directors of a national bank were regulated by the strict principle of a special trust. We think that they are not. It is true that these directors act in a fiduciary capacity, but they are trustees clothed by the statute with a power of management, and this power to manage the affairs of the bank implies a considerable element of discretion. We think that this discretion fully embraces a case in which cash, which is needed for the purpose and legitimate business of the bank, may be obtained for a debt which it holds, although that debt is not yet due. In this case the security was inherited from an institution whose business it was to lend money on real estate securities; but it was not the proper business of its successor, a national bank, to carry such investments, and it would seem to be a very proper act of discretion, in exercising the power of management, to convert such unavailable assets into money by accepting payment in anticipation. We hold, then, that there was no defect of power in the directors to make this transaction, and to bind the bank by a contract that the Jenks loan should be applied immediately to the extinction of the Chipley notes.

But it is objected further that, as a matter of fact, the directors never made any such contract, and that the officers who did make it were not empowered to do so either by virtue of their office or by special authorization. We think it is a sufficient answer to say that the bank received the money and cannot retain it except in accordance with the terms of the contract under which it was received. As to Jenks, it came into the hands of the bank charged with a trust, and the retention of the fund must constitute an acceptance of the trust and at the same time a ratification of the acts of its officers.

If the Chipley notes were extinguished by this transaction, the complainant took nothing by Miss Crane's deed of November 11th, 1878, purporting to convey the premises to him in trust to secure the payment of these notes. Not only was it an attempt to secure a non-existing debt, but it was made by one who was a naked trustee, without power to charge the property.

These views dispose of the case of the receiver. He has

no claim against this property. It remains to consider the case set up by Mrs. Hitz in her cross bill and amended cross bill. She alleges that the deed to Crane, in which she originally appeared to be the sole grantor, was altered after she had executed and acknowledged it, so as to describe herself and her husband as grantors. Having inherited and held the premises as a married woman before the act of 1869, she claims that she continued to hold them as at common law after that act, and that the joinder or non joinder of her husband in her deed was a very material matter; so that an alteration, after she had executed and acknowledged it, was a very material alteration.

It is not worth while to consider the questions touching the effect of a sole conveyance by a married woman, since the act of 1869, of real estate owned by her before that enactment; or touching the effect of alterations made without the knowledge of the grantor before delivery to the grantee, until we shall have considered the question of fact as to when the alteration was made. The scrivener who both prepared the original paper and made these alterations testifies that they were made before Mrs. Hitz signed and acknowledged the deed. He had previously made an affidavit that she had both signed and acknowledged the instrument before they were made. That affidavit is not evidence as to the main question, and is brought out only as affecting the credibility of the witness. In his deposition, however, he is very positive as to his memory that the paper bore no signature when he altered it. A number of witnesses, including experts in processes and in the effect of mechanical processes, and lawyers who spoke from their professional habits and knowledge, were examined as to the question whether the seal which accompanied Mrs. Hitz's acknowledgment was impressed above one of the erasures, or had itself suffered by the process of erasure, thus showing that the erasure was made after acknowledgment. We have very carefully examined both the testimony of the witnesses on this matter and the paper itself. It may be sufficient to state that most of the experts were of opinion that the seal was impressed after the erasures had been made. An allegation, or more properly, an accusation of this kind must be satisfactorily made out, in order to justify a court in holding a deed void for alteration; and this charge has not been made out. Taking the testimony of the only witness who speaks from personal observation as to the presence or absence of a signature when

he made the alteration, and the supporting testimony of the experts, we are compelled to the conclusion that the alteration was made before execution and acknowledgment, and therefore, did not affect the validity of the deed. Even if this were doubtful, it is clear that it was made before delivery to the grantee, and while it was in the hands where Mrs. Hitz left it. There is nothing to show that the grantee knew or was charged to know that the alteration was made without the knowledge and consent of the grantors.

Next, it was objected that the alleged consideration of $40,000 was never paid by Crane. As to Jenks, it is immaterial whether it was paid or not. This conveyance was part of an entire arrangement by which a loan was to be secured on this land, and this arrangement supplied the consideration.

We think, then, that the complainant has no interest in this property in respect of the Chipley notes; that the release of the original trust by Donaldson and Prentiss was valid; that the deed of Crane to complainant further to secure those notes must be cancelled; that the deed of Mrs. Hitz and her husband to Crane, and the deed of Crane to Tyler, in trust to secure Jenks, are valid; and that the trustee in the latter should be allowed to proceed to execute his trust.

It may be that, after payment of the note to Jenks, by sale of the premises, a surplus may remain to be disposed of. It is proper that the trustee be required, in case he makes sale and receives such surplus, to pay the latter into court. It appears also that a considerable amount of rents accruing from the premises has been collected and paid into court by the complainant. In the argument it was claimed on one hand that these sums should go to the creditors of Hitz. For the present, we do not dispose of either question, and this cause will be retained in order that the parties claiming to be interested may litigate their rights by proper further proceedings.